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# IN THE SUPREME COURT OF THE UNITED STATES

*October Term, 1997*

**THE STATE OF COLORADO,**
*Petitioner,*
vs.
**MARIO ROMERO,**
*Respondent.*

On Petition for Writ of Certiorari to
The Supreme Court of the State of Colorado

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

Whether the respondent's mid-statement remark that, "Yea. Cause I, ya know, I'm not gunna lie man, ya know, I mean I should wait, and I should talk to a lawyer and this and that because I do want to go to trial on this," constituted a "clear," "unambiguous," and "unequivocal" request for counsel within the meaning of *Davis v. United States*, 512 U.S. 452 (1994).

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
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On Petition for Writ of Certiorari to
The Supreme Court of the State of Colorado

# PETITION FOR WRIT OF CERTIORARI

The State of Colorado petitions for a writ of certiorari to review the judgment of the Supreme Court of Colorado, which upheld the suppression of the respondent's confession in a first degree murder case on the ground that the confession was obtained in violation of the Fifth Amendment.

## OPINION BELOW

The opinion of the Colorado Supreme Court is reported at ____ P.2d ____ (Colo. 1998) (Pet. App. A).

The pretrial suppression order of the Alamosa County District Court is not reported (Pet. App. B).

## JURISDICTION

The opinion of the Colorado Supreme Court was issued on January 26, 1998 (Pet. App. A-1). Under state law (Colo. R. App. P. 4.1(g)), no petition for rehearing was permitted, and mandate issued forthwith.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

## CONSTITUTIONAL PROVISIONS

Th h Amendment to the United States Constitution provides, pertinent part: "No person shall . . . be compelled in any criminal case to be a witness against himself . . . ."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

## STATEMENT OF THE CASE

**Course of the Proceedings Below; Presentation of the Federal Question in the State Courts.** In March 1997, a homicide occurred in Alamosa, Colorado (Pet. App. A-2 to A-3). On April 1, 1997, law enforcement officers conducted a custodial interrogation of Mario Romero (Pet. App. A-3; a transcript of the audiotaped interrogation is appended as Pet. App. C). Romero admitted that he had shot the victim,

although he asserted that he had acted in self-defense (Pet. App. A-5; Pet. App. C).

Thereafter, the State charged Romero with first-degree murder and related crimes (Pet. App. A-7). Romero filed a pretrial motion to suppress his statements made during the custodial interrogation, thereby raising the federal question which is presented here (Pet. App. B-1). In August 1997, after a hearing, the trial court granted the motion to suppress upon concluding that the officers had continued to interrogate Romero after he made an "unambiguous" request for an attorney within the meaning of *Davis v. United States*, 512 U.S. 452 (1994) (Pet App. A-7 to A-8; Pet. App. B).

The State filed an interlocutory appeal of the suppression order in the Colorado Supreme Court, as authorized by state law (Colo. Rev. Stat. § 16-12-102(2) (1997); Colo. R. App. P. 4.1). On January 26, 1998, the Colorado Supreme Court announced its decision affirming, on a 6-to-1 vote, the trial court's suppression order. *People v. Romero*, No. 97SA311 (Colo. Jan. 26, 1998) (Pet. App. A).

The Colorado Supreme Court based its decision entirely on federal constitutional grounds: "Under the Fifth Amendment of the United States Constitution, we uphold the district court's findings and conclusions that Romero sufficiently clearly invoked his right to an attorney during questioning and that custodial statements he made subsequently during the interrogation must be suppressed." (Pet. App. A-8 to A-9.)

**Finality of the Judgment Below.** The Colorado Supreme Court's affirmance of the pretrial suppression order was a "final judgment" within the meaning of 28 U.S.C.

§ 1257, for it was a final decision on the merits of the federal question presented, and later review of the federal question cannot be had, whatever the ultimate outcome of the respondent's pending trial. *See New York v. Quarles*, 467 U.S. 649, 651 n.1 (1984). *See also Colorado v. Connelly*, 479 U.S. 157, 161-63 (1986) (posture of case identical to instant case); *Colorado v. Bannister*, 449 U.S. 1 (1980) (same).

**The Custodial Interrogation.** It is undisputed that at the outset of the custodial interrogation in this case, the respondent was sufficiently advised of, and validly waived, his *Miranda* rights (*Miranda v. Arizona*, 384 U.S. 436 (1966)), and that all of his statements were voluntary (Pet. App. A-4, A-33; Pet App. B-4 to B-6).

After waiving his *Miranda* rights, Romero began to describe the circumstances of the shooting (Pet. App. C-2 to C-4). He was at home, drinking. A car unexpectedly pulled up in front of his house. Several persons got out of the car and started coming toward the house. They had threatened him previously, which was "the reason for the gun." (*Id.*) The following crucial exchange then occurred:

> [OFFICER]: So what were you thinking when the gun went off?
>
> ROMERO: I don't know, I, I, I just don't know, man, I was just [expletive], I was in fear man, for my life because they're, my kids were there, Vida's pregnant from me, ya know, I mean . . . .
>
> [OFFICER]: So you thought you were defending yourself when you shot at the car?

ROMERO: **Yea. Cause I, ya know, I'm not gunna lie man, ya know, I mean I should wait, and I should talk to a lawyer and this and that because I do want to go to trail [sic] on this.**

[OFFICER]: Did you think you'd have a valid point?

ROMERO: I think I do, man, because, ya know, I mean because check this out man, I went to their house the night before that, and . . . .

(Pet. App. C-4) (emphasis added).

The custodial interrogation then continued for more than an hour, during which Romero made potentially inculpatory statements about his prior contacts with the victims and the events surrounding the shooting (Pet. App. A-3 to A-6; Pet. App. C-4 to C-74).

At the suppression hearing, the interrogating officer, Officer Needham, testified that his understanding of the above-emphasized reference to counsel was that Romero was acknowledging that he knew he ought to talk with a lawyer, but that Romero had decided, nevertheless, to go ahead and speak with Needham because he was eager to convince Needham that he had acted in self-defense (Pet. App. A-22, A-35, B-8). "In the totality of everything that [had] gone on in this particular interview at this particular time, it was not my impression that he wanted to see a lawyer to consult with at the time of the interview." (Pet. App. A-35.)

Needham also testified that he "had read the case law in this area," including *Davis*; that pursuant to the case law "he understood the defendant's statement that 'I should get a

lawyer' to be ambiguous"; and that he therefore purposefully continued the interrogation (Pet. App. B-8).

Based on their review of the audiotape of the interrogation, the courts below found that "[t]he atmosphere was 'friendly' and conversational" (Pet. App. B-6), and that Officer Needham remained "courteous and businesslike in tone" (Pet. App. A-19).

**Disposition in the Courts Below.** The trial court ruled, and the majority of the Colorado Supreme Court held, that Romero's reference to counsel constituted a clear, unequivocal assertion of the right to counsel under the standard of *Davis v. United States*, 512 U.S. 452 (1994).[1]

The trial court recognized that since Romero had validly waived his *Miranda* rights at the outset of the interrogation, the issue was whether his later reference to a "lawyer" constituted an "unambiguous request for an attorney" within the meaning of *Davis* (Pet. App. B-6 to B-10). The trial court reasoned that Romero's reference to counsel was "clearer than" or "impossible to distinguish from" similar references which the Colorado Supreme Court had held, in several pre-*Davis* cases, to constitute clear requests for

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[1] The quoted reference to counsel appears at page 3 of the confession transcript, which is reproduced at page 4 of Appendix C (Pet. App. C-4). The opinion of the Colorado Supreme Court also refers to another reference to counsel at "page thirty-five" of the confession transcript (Pet. App. A-6), which is reproduced at page 48 of Appendix C (Pet. App. C-48). The second reference to counsel is not at issue here, nor was it at issue below, for the issue before the Colorado Supreme Court was the suppression of the statements contained between pages 3 and 35 of the confession transcript, *i.e.*, between Pet. App. C-4 and Pet. App. C-48.

counsel -- references such as "I think I need to see an attorney" and "When can I get a lawyer?" (Pet. App. B-9 to B-10; *see* Pet. App. A-24).

The State appealed to the Colorado Supreme Court, contending "under *Davis*, that Romero's statement was not a sufficiently clear expression of his desire for legal counsel" (Pet. App. A-8).

The Colorado Supreme Court affirmed. The court concluded that under *Davis*, "The legal standard is objective -- whether in the context of question and answer, the suspect's responses reasonably could be construed by a police officer to mean that the suspect wanted a lawyer." (Pet. App. A-20). The court "agree[d] with" the trial court's conclusion that "Romero's statement, 'I should talk to a lawyer,' reasonably conveyed that the interrogating officer should provide him with an attorney . . . ." (Pet. App. A-19, A-23.)

The court held that in assessing the clarity or ambiguity of a suspect's reference to counsel, "courts must give 'a broad, rather than a narrow, interpretation to a defendant's request for counsel'" (Pet. App. A-14) (citations omitted).

The court held that the clarity of the reference must be assessed under a multi-factor "totality of the circumstances analysis," specifically taking into account that "citizens under custodial interrogation will speak in their own tongues" (Pet. App. A-13, A-15, A-17 to A-19). Thus, the court held, "The trial court in applying *Davis* properly took into account Romero's pattern of speech," including his liberal use of "expletives and slang" and his idiosyncratic grammatical constructions (Pet App. A-21).

The court also reaffirmed the validity of its pre-*Davis* cases holding that such phrases as "When can I get an attorney?" were sufficiently clear requests for counsel. The court held that, "In light of *Davis*, we reaffirm such invocations of the right to counsel as being sufficiently clear for Fifth Amendment purposes" (Pet. App. A-23 to A-24).

Justice Mullarkey, dissenting, was of the opinion that the majority had misapprehended *Davis*, and had failed to perceive that "*Davis* is a significant change in the applicable legal standard" (Pet. App. A-31). Justice Mullarkey criticized the majority for wholly failing to apply the *Davis* test -- "whether a reasonable police officer in the circumstances would understand the statement to be a request for an attorney" (Pet. App. A-31 to A-32, A-35).

Justice Mullarkey concluded that under a correct reading of *Davis*, Romero's reference to counsel was "the quintessential equivocal statement" (Pet. App. A-36).

## REASONS FOR GRANTING THE PETITION

There are two compelling reasons for granting certiorari in this case.

First, the opinion of the Colorado Supreme Court directly conflicts with both the letter and the spirit of the *Davis* standard for determining whether a suspect's reference to counsel qualifies as a clear and unequivocal request for counsel so as to require the cessation of interrogation. Moreover, while the opinion of the Colorado Supreme Court also conflicts with the majority of the post-*Davis* decisions of other state and federal courts, its opinion solidifies the

viewpoint expressed by several courts which have laid a basis for undermining *Davis*.

Second, the case also presents the opportunity to address difficulties arising in the application of the *Davis* standard with which state and federal courts nationwide have struggled, leading to discrepant analyses and results.

## I. THE OPINION OF THE COLORADO SUPREME COURT CONFLICTS WITH BOTH THE LETTER AND SPIRIT OF THE *DAVIS* STANDARD FOR DETERMINING WHETHER A SUSPECT'S REFERENCE TO COUNSEL QUALIFIES AS A CLEAR AND UNEQUIVOCAL REQUEST FOR COUNSEL SO AS TO REQUIRE THE CESSATION OF INTERROGATION.

After waiving his *Miranda* rights, Romero began to describe the circumstances of the shooting. The interrogating officer asked him, "So you thought you were defending yourself when you shot at the car?" He responded, "Yea. Cause I, ya know, I'm not gunna lie man, ya know, **I mean I should wait, and I should talk to a lawyer and this and that because I do want to go to trial on this.**" (emphasis added). The Colorado Supreme Court held that this remark constituted a clear, unequivocal assertion of the right to counsel under the standard of *Davis v. United States*. However, the opinion misreads the *Davis* standard and turns it on its head.

### A. The Rule of *Davis*.

In *Davis*, this Court announced the rule that "after a knowing and voluntary waiver of the *Miranda* rights, law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney." 512 U.S. at 461.

The *Davis* court held that in order to meet "the requisite level of clarity" required for a qualifying "unambiguous" request for counsel, the suspect "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances *would* understand the statement to be a request for an attorney." 512 U.S. at 459 (emphasis added). "But if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable police officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel," officers need not cease questioning. *Id.* (emphasis by Court).

The Court sought to provide a rule "that can be applied by officers in the real world of investigation and interrogation" with "clarity and ease of application," so that police officers would not "be forced to make difficult judgment calls about whether the suspect in fact wants a lawyer even though he hasn't said so, with the threat of suppression if they guess wrong." 512 U.S. at 461.

### B. The Colorado Supreme Court's Analysis Disregards *Davis*.

Misreading the *Davis* standard, a majority of the Colorado Supreme Court concluded that "the legal standard . . . is whether in the context of question and answer, the suspect's responses reasonably **could** be construed by a police officer to mean that the suspect wanted a lawyer." (Pet. App. A-20) (emphasis added). After initially paying lip service to the *Davis* standard (Pet. App. A-10 to A-11), the majority distorted the standard by ultimately holding that "when reviewing a defendant's statement for an alleged ambiguity, **courts must give 'a broad, rather than a narrow, interpretation** to a defendant's request for counsel.'" (Pet. App. A-14, quoting *Michigan v. Jackson*, 465 U.S. 625, 633 (1986) [emphasis added]).

This is directly contrary to *Davis*' teaching that if a reference to counsel requires broad interpretation in order to be understood as a request for counsel, necessarily it is ambiguous, and officers should not have to guess at its interpretation, "with the threat of suppression if they guess wrong," 512 U.S. at 461. "[A]n ambiguous statement that **could** reasonably be understood to express a desire to consult a lawyer" does not pass *Davis*' requisite level of clarity test. 512 U.S. at 466 (Souter, J., concurring in judgment) (emphasis added).

*McNeil v. Wisconsin*, 501 U.S. 171, 178 (1991), further explains why the "broad, rather than narrow" standard is constitutionally erroneous in the instant context: the "broad, rather than narrow" standard applies to the question "whether the Sixth Amendment right to counsel had been *waived*," and not to "whether the *Miranda* 'Fifth

Amendment' right had been *asserted*" or to assessment of the sufficiency of "the *expression* . . . of a wish to have counsel present during custodial interrogation" which is "necessary to trigger *Edwards*" (*Edwards v. Arizona*, 451 U.S. 477 (1981)) and, now, *Davis*. 501 U.S. at 178 (emphasis by *McNeil* court).

Additional evidence of the Colorado Supreme Court's resistance to *Davis* is found in its constitutionally erroneous treatment of a suspect's inarticulate or diffident use of language. While the *Romero* majority's application of a "totality of the circumstances" test (Pet. App. A-15 to A-18) may be properly derived from *Davis*' statement that a suspect's reference to counsel must be evaluated "in light of the circumstances," 512 U.S. at 459, it includes a number of factors which stray far afield from *Davis*. Most notably, the *Romero* majority held that a leading circumstance supporting the determination that Romero clearly requested counsel was "Romero's pattern of speech" (Pet. App. A-17, A-21) and the fact that "citizens under custodial interrogation will speak in their own tongues" (Pet. App. A-19).

This is in direct conflict with *Davis*' frank acknowledgement that "requiring a clear assertion of the right to counsel might disadvantage some suspects who -- because of fear, intimidation, lack of linguistic skills, or a variety of other reasons -- will not clearly articulate their right to counsel . . . ." 512 U.S. at 460. The majority of the Colorado Supreme Court in this case simply refused to accept the "demand for heightened linguistic care," 512 U.S. at 469 (Souter, J., concurring in judgment), placed on suspects by *Davis*. In so doing, it undermined *Davis*' goal of establishing a rule which could be applied with clarity and ease in the real world of interrogation.

Justice Mullarkey of the Colorado Supreme Court, dissenting, believed that the majority had "reject[ed]" *Davis* -- which, of course, it was not at liberty to do. *People v. Romero* (Mullarkey, J., dissenting) (Pet. App. A-31). Justice Mullarkey observed that "the majority omits . . . any assessment of how a reasonable police officer would have interpreted Romero's remark." (Pet. App. A-35.)

Justice Mullarkey correctly concluded that the respondent's reference to counsel was "the quintessential equivocal statement": "Romero's statement is subject to at least two interpretations. One is . . . that *he knew he should talk with a lawyer but that he had decided to go ahead and speak with [the officer]*" (emphasis added). He hoped to convince the officer that he acted in self-defense." (Pet. App. A-35 to A-36.)

That interpretation accords with the understanding of the statement that a reasonable officer in the circumstances would have had. Indeed, Romero's recognition that "I should talk to a lawyer and this and that **because I do want to go to trial on this**" (emphasis added) connotes a desire for the assistance of counsel to prepare for a trial at a future date, not to a desire for the immediate presence of counsel during the police interrogation. *See Lord v. Duckworth*, 29 F.3d 1216, 1218, 1221 (7th Cir. 1994) (suspect's remark which refers to "future access to counsel for a court hearing rather than a request for counsel at that time" lacks "the clear implication of a present desire to consult with counsel"). Necessarily, then, a reasonable police officer would have understood no more than that Romero *might* be expressing a present desire for counsel.

Justice Mullarkey also observed that the majority's opinion undermined *Davis*' goal of establishing a rule "that can be applied in the real world," 512 U.S. at 461, for "it is

entirely unrealistic to ask a police officer to distinguish between the statement in *Davis* -- 'Maybe I should talk to a lawyer' -- which the Supreme Court held *was not* a request for counsel and the statement in this case -- 'I should talk to a lawyer' -- which the majority holds *was* a request for counsel." (Pet. App. A-36) (emphasis in original).

### C. While the Colorado Supreme Court's Analysis Conflicts with the Majority of Post-*Davis* Decisions of Other State and Federal Courts, Its Opinion Solidifies the Viewpoint Expressed by Several Courts Which Have Laid a Basis for Undermining *Davis*.

The decision of the Colorado Supreme Court conflicts not only with *Davis*, but also with the majority of post-*Davis* decisions of state and federal courts which have been faithful to *Davis*. With this case, *compare*, *e.g.*, *State v. Parker*, 886 S.W.2d 908, 918 (Mo. 1994) (suspect's statement that he "**ought to talk to an attorney**" did **not** unambiguously invoke his right to counsel under the *Davis* standard) (emphasis added), *cert. denied*, 115 S. Ct. 1827 (1995); *Matthews v. State*, 106 Md. App. 725, 737-38, 666 A.2d 912, 917-18 (1995) (suspect's question, "**Where's my lawyer?**", was **not** an unambiguous and unequivocal request for counsel under the *Davis* standard) (emphasis added), *cert. denied*, 341 Md. 648, 672 A.2d 623 (1996); *United States v. Scurlock*, 52 F.3d 531 (5th Cir. 1995) (suspect's comment that she "**needed a lawyer,**" held, **not** a clear request for counsel) (emphasis added); *Lord v. Duckworth*, 29 F.3d at 1218, 1221 (suspect's remark, "**I can't afford a lawyer but is there anyway I can get one?**", held, **not** a clear request for counsel) (emphasis added); *Diaz v.*

*Senkowski*, 76 F.3d 61 (2d Cir. 1996) (suspect's remark, "**Do you think I need a lawyer?**", held, **not** a clear request for counsel) (emphasis added).

In contrast, a minority of other courts shares the resistance of the Colorado Supreme Court to *Davis*. Both the Ninth Circuit, in *United States v. Cheely*, 36 F.3d 1439 (9th Cir. 1994) and *Krysinski v. Rowland*, No. 94-16749, 1996 WL 218172 (9th Cir. Apr. 29, 1996) (unpublished decision), and the Fourth Circuit, in *Correll v. Thompson*, 63 F.3d 1279 (4th Cir. 1995), *cert. denied*, 116 S. Ct. 688 (1996), have opened the door to an undermining of *Davis*.

*Krysinski*, while unpublished, is instructive because it bears a striking similarity of analysis to the instant case. In a 2-to-1 decision, a majority of a Ninth Circuit panel held that the suspect's remark, "Do I get to talk to a lawyer or something?" was an unequivocal request for counsel. Like the Colorado Supreme Court in *Romero*, the Ninth Circuit relied in significant part on the erroneous "broad, rather than narrow" standard and on its own pre-*Davis* precedents, including *Smith v. Endell*, 860 F.2d 1528 (9th Cir. 1988), *cert. denied*, 498 U.S. 981 (1990), in which the Ninth Circuit held, in a 2-1 decision, that the same phrase involved here -- "**I should talk to a lawyer**" (emphasis added) -- was an unequivocal and unambiguous request for counsel.

Judge Rymer, dissenting in *Krysinski*, opined that the pre-*Davis* decisions "are no longer good law on whether the statements made there (let alone here) are ambiguous." *Id.* Similarly, Justice Mullarkey, dissenting in the instant case, opined that the majority had failed to appreciate that *Davis* wrought "a significant change in the applicable legal standard." (Pet. App. A-31.)

More recently, in *Cheely*, the Ninth Circuit further undermined the clarity of the *Davis* rule. Refusing to acknowledge that *Davis* held that the remark, "Maybe I should talk to a lawyer," was equivocal, the Ninth Circuit stated that the equivocal nature of Davis' remark depended on his subsequent clarifications that, "No, I am not asking for a lawyer," and, "No, I don't want a lawyer." *Cheely*, 36 F.3d at 1448. That is contrary to *Davis*.

In *Correll*, the Fourth Circuit, like the Colorado Supreme Court here, reaffirmed the validity of a pre-*Davis* decision which appears to squarely conflict with *Davis*. *Correll* cited with approval the Eleventh Circuit's 1991 decision in *Cannady v. Dugger*, 931 F.2d 752 (11th Cir. 1991), which had held that the suspect's statement, "**I think I should call my lawyer**" (emphasis added), was an unequivocal request for counsel.

Thus, the problems described extend beyond the resolution of this particular case by the Colorado Supreme Court. While most courts faithfully apply *Davis* and place the burden of ambiguity on the suspect, other courts are prepared to pay scant lip service to *Davis*, then turn *Davis* upside down and place the burden of the suspect's ambiguity on the government. Those courts have laid the basis for continued undermining of *Davis*. Their disregard of *Davis* warrants certiorari review of this case.

## II. THIS CASE ALSO PRESENTS THE OPPORTUNITY TO ADDRESS DIFFICULTIES ARISING IN THE APPLICATION OF THE *DAVIS* STANDARD WITH WHICH STATE AND FEDERAL COURTS NATIONWIDE HAVE STRUGGLED, LEADING TO DISCREPANT ANALYSES AND RESULTS.

Even those state and federal courts which have been faithful to *Davis* have often struggled with interpreting and applying the *Davis* standard. Among all of the post-*Davis* decisions there exists a significant uncertainty concerning a point left unsettled by *Davis*.

By establishing the "requisite level of clarity" rule, *Davis* sought to create a standard that can be reliably applied "in the real world." 512 U.S. at 459, 461. Yet *Davis* left open a window of opportunity for lower courts to avoid any real certainty of application, by suggesting that the "requisite level of clarity" could be a rather elastic concept inasmuch as the clarity of a reference to counsel was to be assessed "in light of the circumstances," 512 U.S. at 459.

The tension between the competing values of certainty and flexibility which is reflected in that language was not resolved by the conclusory case-specific holding in *Davis*. The Court devoted most of the *Davis* opinion to developing the "requisite level of clarity" standard. At the end of the opinion, the Court noted that the courts below had held that the suspect's remark in that case -- "Maybe I should talk to a lawyer" -- was not a request for counsel, and held in summary fashion that "we see no reason to disturb that conclusion." 512 U.S. at 462.

Significantly, the Court did not indicate whether it deemed the phrase, "Maybe I should talk to a lawyer," categorically ambiguous on its face, or whether that determination required a case-by-case determination of what a reasonable police officer would have made of that phrase "in light of the circumstances," 512 U.S. at 459. Lower courts have demonstrated uncertainty over which is the case, and that uncertainty has led to divergences in analytical methodology as well as result.

On the one hand, some courts read *Davis* as focusing on the clarity of the suspect's phraseology on its face, and as holding that the phrase, "Maybe I should talk to a lawyer," is ambiguous *per se*. *See, e.g.*, *Taylor v. State*, 689 N.E.2d 699, 703 (Ind. 1997) ("In *Davis*, the defendant's statement 'maybe I should talk to a lawyer' was held not to be a request for counsel"). If that is so, then the instant case can be distinguished from *Davis* only by the presence or absence of the word "maybe." Indeed, in *Krysinski*, *supra*, the Ninth Circuit attached great significance to the presence or absence of "words of equivocation such as 'might' or 'maybe' or 'perhaps,'" as did the trial court in the instant case (Pet. App. B-8).

On the other hand, some courts emphasize the importance of the context in which the phrase is uttered. *See, e.g.*, *Medina v. Singletary*, 59 F.3d 1095, 1101, 1104-05 (11th Cir. 1995) (refusing to adopt a "*per se* rule" that a suspect's response, "No," is categorically unambiguous; holding that the meaning of a response must be determined on a case-by-case basis by assessing the "entire context," including the "events preceding" and "nuances inherent in" the response) (quoting *Smith v. Illinois*, 469 U.S. 91, 100 (1984)), *cert. denied*, 116 S. Ct. 2505 (1996); *see also Davis*, 512 U.S. at 474 n.7 (Souter, J., concurring in judgment) ("[d]ifferences between certainty and hesitancy

may well turn on the inflection with which words are spoken") (quoting *Smith v. Illinois*, 469 U.S. at 101 (Rehnquist, J., dissenting)).

As a result, the uncertainty which historically has imbued the determination of this issue has persisted post-*Davis*. As Justice Souter noted in his concurring opinion in *Davis*, "[I]n police stations and trial courts the question, 'how clear is clear?' is not so readily answered." 512 U.S. at 474 n.7 (Souter, J., concurring in judgment). Justice Souter noted that the apparently discrepant pre-*Davis* appellate decisions are difficult to reconcile. *Id.*

Since *Davis*, the discrepancies have continued. *Compare Romero* ("should talk to a lawyer" is a clear request) *with State v. Parker*, *supra* ("ought to talk to a attorney" is not a clear request). Further guidance is needed and can be supplied in this case.

If *Davis* truly created a standard capable of application with clarity and ease, then the simple issue of the sufficiency of a remark utilizing such common language as was used here -- "I should talk to a lawyer" -- should not present great difficulty. Yet police officers today remain in precisely the situation from which *Davis* sought to extricate them -- having to guess what to do, with the threat of suppression if they guess wrong.

Consider the various phrases commonly used by suspects in this context -- for example, "I should talk to a lawyer"; "Maybe I should talk to a lawyer"; and "I think I need to see an attorney." As to each phrase: is it (a) categorically an ambiguous, hence insufficient, request for counsel in all cases?; or (b) categorically an unambiguous, hence sufficient, request for counsel in all cases?; or does it (c) indeed depend on context, circumstance, and nuance, so

that it is quite tolerable to leave the inquiry to trial and appellate courts around the country on a case-by-case basis, increasing the risk to interrogating officers and yielding what otherwise may appear to be conflicting judicial determinations? The answer remains unclear. The Court can resolve the uncertainty by reviewing this case.

* * * * *

Time and again this Court has affirmed that "the ready ability to obtain uncoerced confessions is not an evil but an unmitigated good," *McNeil*, 501 U.S. at 181, and that confessions lost due to *Miranda* violations "extract a real price from society," *Davis*, 512 U.S. at 474 (Souter, J., concurring in judgment). In *Davis*, the Court sought to define with clarity where *Miranda*'s several layers of prophylaxis finally came to an end. But *Davis* has not been clearly understood or consistently applied by lower courts. The Court should use this case to finish *Davis*' work.

## CONCLUSION

The petition for writ of certiorari should be granted.

The judgment of the Colorado Supreme Court should be summarily reversed. The Colorado Supreme Court's misreading of *Davis* is sufficiently clear-cut that summary reversal in a per curiam opinion is an appropriate disposition of this case. Alternatively, full briefing on the merits should proceed.

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## APPENDIX A

SUPREME COURT, STATE OF COLORADO
No. 97SA311 January 26, 1998

THE PEOPLE OF THE STATE OF COLORADO, Plaintiff-Appellant,

v.

MARIO ROMERO, Defendant-Appellee.

Interlocutory Appeal from the District Court, Alamosa County
Honorable O. John Kuenhold, Judge

EN BANC RULING AFFIRMED

JUSTICE HOBBS delivered the Opinion of the Court.
JUSTICE MULLARKEY dissents.

In this interlocutory appeal under C.A.R. 4.1 and section 16-12-102(2), 6 C.R.S. (1997), the prosecution challenges an order of the Alamosa County District Court suppressing statements the defendant Mario Romero (Romero) made during custodial interrogation. The district court determined that police officers had delivered a proper advisement under *Miranda v. Arizona*, 384 U.S. 436 (1966), and had secured a written waiver of rights but improperly continued to question Romero after he requested the assistance of legal counsel within the meaning of *Davis v. United States*, 512 U.S. 452 (1994). We agree with the district court that oral and written statements Romero made in response to police questions after he requested counsel must be suppressed.

I.

On March 27, 1997, Romero was at home in Alamosa drinking large amounts of "Kentucky Deluxe"--"three to six pints," he said-with his friend, Jesse Ortega (Ortega).

Romero's pregnant wife and his children also were at home. A vehicle unexpectedly arrived in front of the house. Several persons exited and came towards the house holding bottles and bats. From previous confrontations, Romero recognized them as members of the "Eastside Gang." He took a few minutes to retrieve a rifle from under the floorboards of the house and then apparently fired at the car from inside the house. A shot struck and killed Joe Cervantes who was sitting in the front passenger seat.

Romero fled the San Luis Valley and was arrested in Adams County. Officers Rick Needham (Needham) and Shawn Woods of the Alamosa Police Department interrogated Romero at the Adams County jail on April 1, 1997, after Needham read Romero his *Miranda* rights and Romero had executed a written waiver. The record contains a tape recording of the interrogation, a fifty-four page transcript of the interrogation, and a suppression hearing transcript.

The first page of the interrogation transcript contains

Needham's advisement to Romero.[1] Romero answered in response that he understood his rights and then signed the waiver form. Needham commenced the interrogation with open-ended questions about the circumstances of the shooting. Needham promptly turned to specific questions regarding Romero's intent and potential defenses:

> Needham: So what were you thinking when that gun went off?
> Romero: I don't know, I, I, I just don't know man, I was just [expletive], I was in fear man, for

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[1]The advisement given in this case is set forth on page 1:

> Time is 1354, we're at Adams County Jail with Mario Romero. Um, first, you do have a right to remain silent anything you say can and will be used against you in a court of law. You have the right to talk to a lawyer and have him present with you while you're being questioned. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning if you wish. **You can decide at any time to exercise each [sic] rights and not answer any questions or make any statements.** Do you understand everything I read to you?

(Emphasis added.)

my life because they're, my kids were there, Vida's pregnant from me, ya know, I mean. . . .
Needham: **So you thought you were defending yourself when you shot at the car?**
Romero: **Yea.** Cause I, ya know, I'm not gunna lie man, ya know, I mean I should wait, and I **should talk to a lawyer** and this and that and ya know **because I do want to go to trial on this.**

(Emphasis added.) Needham quickly continued to probe Romero's claim of self-defense:

Needham: Did you think you'd have a valid point?

Romero proceeded thereafter to make potentially damaging statements about his prior contacts with the "gang members" and events surrounding the shooting, all the while attempting to justify himself to the interrogating officer. For example, he proceeded to state that he, Ortega, and a third person several nights before had gone to the house of the other persons-to say they wanted no trouble, he claimed-but left when they "started all panicking." He also said that he and Ortega discussed shooting the gang members during the three to four minutes it took to retrieve the rifle.

On page thirty-fi e of the transcript, when Romero again referenced legal counsel, Needham prolonged the questioning by indicating that Romero had already "made the choice" not to have a lawyer during questioning and holding out the possibility of a charge of less than first degree murder for Romero if he would continue talking without the assistance of counsel:

> Romero: I still won't be, I mean, I mean, look already [expletive], see I don't even understand this man, cause. . . .
> Needham: Okay, what don't you understand?
> Romero: People telling me that I shouldn't [expletive] talk to you guys.
> Needham: **Well I think by talking to us. . . .**
> Romero: **That I should talk to a lawyer first. . . .**
> Needham: **Well, you made the choice.**
> Romero: **I mean that I don't, ya know. . . .**
> Needham: Right now, when we walked in here, we were looking at 1st degree murder, okay, now I'm not so sure I'm looking at 1st degree murder. **I was looking at charging . st you with 1st degree murder, but now I'm thinking Jesse's got a lot more involvement than Jesse's been telling me. Okay. I'm thinking maybe second or something else.** Okay. But that's the DA.

(Emphasis added.) The interrogation lasted about two hours, including the time it took Romero to make a written



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statement during a break in the questioning. Three days later, on April 4, 1997, the prosecution charged Romero with murder in the first degree and other offenses[2] and sought to use his oral and written statements without restriction at trial.

At the suppression hearing, in reference to Romero's first statement, "I should talk to a lawyer," on the third page of the transcript, Needham testified that, "I did not at that point or any subsequent point or any prior point believe that he wanted a lawyer. I believe he wanted to talk to me."

The district court used a totality of the circumstances analysis in finding and concluding that,

> Mr. Romero's statement was an unambiguous request for an attorney. It was made shortly after the questioning began with his rights firmly in mind. He had declared his actions were in

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[2]Romero was charged with: murder in the first degree, *see* § 18-3-102(1)(a), 6 C.R.S. (1997); criminal attempt to commit accessory to crime, *see* § 18-2-101, 6 C.R.S. (1997); accessory to crime, *see* § 18-8-105(1)-(2), 6 C.R.S. (1997); murder in the first degree, *see* § 18-3-102(1)(d), 6 C.R.S. (1997); mandatory sentence for violent crimes, *see* § 16-11-309, 6 C.R.S. (1997).

> self-defense. Initially the detective asked open-ended questions that let the defendant talk. The detective then asked two specific questions seeking to obtain evidence of *mens rea*. It is at this point that the defendant states, "I should get an attorney."

Accordingly, the district court suppressed all oral and written statements which Romero made after requesting an attorney but determined that those statements could be used on cross-examination in the event that Romero testifies at trial.

The prosecution contends, under *Davis*, that Romero's statement was not a sufficiently clear expression of his desire for legal counsel. We disagree and uphold the district court's suppression order.

## II.

Under the Fifth Amendment to the United States Constitution,[3] we uphold the district court's findings and conclusions that Romero sufficiently clearly invoked his right

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[3]In pertinent part, the Fifth Amendment to the United States Constitution states, "nor shall [a person] be compelled, in any criminal case, to be a witness against himself."

to an attorney during questioning and that custodial statements he made subsequently during the interrogation must be suppressed.

## A.

### Self-Incrimination and the Right to Counsel During Custodial Interrogation

The Fifth Amendment privilege against self-incrimination includes the right to have a lawyer present during custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436, 470 (1966). An essential element of *Miranda* is that a suspect who commences answering questions without an attorney present may change his or her mind at any time thereafter in light of the questions being asked. If an accused "indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking there can be no questioning." *Miranda*, 384 U.S. at 444-45. The court held that a suspect has a right to counsel during custodial interrogation in order to dispel the "compelling atmosphere" of the interrogation. *Id.* at 465.

The denial of a suspect's request for an attorney undermines his or her ability to exercise the privilege against self-incrimination, "to remain silent if he [chooses] or to speak without any intimidation, blatant or subtle." *Id.* at 466. Moreover, without the protections flowing from an adequate warning and the rights of counsel, "'all the careful safeguards erected around the giving of testimony, whether by an accused or any other witness, would become empty formalities in a procedure where the most compelling possible evidence of guilt, a confession, would have already been obtained at the unsupervised pleasure of the police.'" *Id.* (quoting *Mapp v. Ohio*, 367 U.S. 643, 685 (1961)(Harlan, J., dissenting)).

Whether an accused has invoked the right to counsel during questioning is an objective inquiry. In a 1994 decision, the United States Supreme Court held that the question requires the trial court to consider whether the accused's statement "'can reasonably be construed to be an

expression of a desire for the assistance of an attorney.'" *Davis v. United States*, 512 U.S. 452, 459 (1994) (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 178 (1991)) (emphasis added). If the desire for counsel is presented "sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney," no ambiguity or equivocation exists, and all questioning must cease until the person can consult counsel or the accused voluntarily reinitiates conversation. *Davis*, 512 U.S. at 459 (emphasis added).[4]

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[4]In *Davis*, about an hour and a half into the interview, the suspect said, "Maybe I should talk to a lawyer." *Davis*, 512 U.S. at 455. The police proceeded to explain his rights again, at which time the suspect said, "No, I'm not asking for a lawyer," and, "No, I don't want a lawyer." *Id.* After a short break, the interrogators reminded the suspect of his rights to remain silent and to counsel. The interview continued for another hour, and the suspect then said, "I think I want a lawyer before I say anything else." *Id.* At that time, questioning ceased. The Supreme Court allowed prosecutorial use of the statements made between the two accompanying statements, "Maybe I should talk to a lawyer," and, "No, I don't want a lawyer," and the later statement of the suspect that terminated the interrogations, "I think I want a lawyer."

Our prior decisions addressing what is a sufficiently clear statement requesting counsel, as opposed to an ambiguous statement, are consistent with the *Davis* test and prior United States Supreme Court precedent. An ambiguous communication is a "type of conduct, giving rise to opposing inferences." *People v. Benjamin*, 732 P.2d 1167, 1171 (Colo. 1987) (defendant's signing of a form to request a determination whether he was eligible for the assistance of counsel without cost to him was not a request for counsel under the Fifth Amendment; although his conduct supported an inference that he wanted an attorney, it also gave rise to an "equally logical inference" that he was considering his options and was not requesting counsel).

*Davis* requires a person to make a recognizable "expression of a desire" for legal assistance. *Davis*, 512 U.S. at 459. We have said that a statement sufficiently reflects a desire for counsel when it "put[s] the officers on notice that the defendant intend[s] to exercise his right to

counsel and his right against self-incrimination." *People v. Fish*, 660 P.2d 505, 509 (Colo. 1983) (defendant's question to interrogating officer whether he needed an attorney-to which officer answered no-sufficiently clearly invoked right to counsel).

Although the inquiry into whether an accused requested counsel is objective, it may take into account the fact that suspects may not, due to their particular characteristics and the circumstances of the police interview, request an attorney "in the most sophisticated or legally proper form." *People v. Harris*, 191 Colo. 234, 237, 552 P.2d 10, 12 (1976) (in connection with his rights being read, the suspect asked, "When can I get a lawyer," to which the interrogating officer replied, "Monday morning."). For example, a person's youth, lack of sophistication, and nervous and upset condition may be considered among other pertinent circumstances in determining whether his or her statement reasonably could be construed as a request for counsel. *See*

*id.* at 236-37, 552 P.2d at 11-12. Because suspects may not be legally sophisticated or paragons of clarity in their use of language, "[w]hen reviewing a defendant's statement for an alleged ambiguity, courts must give 'a broad, rather than a narrow, interpretation to a defendant's request for counsel.'" *People v. Kleber*, 859 P.2d 1361, 1363 (Colo. 1993) (quoting *Michigan v. Jackson*, 475 U.S. 625, 633 (1986) (explaining that "the Sixth Amendment right to counsel at a postarraignment interrogation requires at least as much protection as the Fifth Amendment right to counsel at any custodial interrogation," *id.* at 632)).

In *Edwards v. Arizona*, 451 U.S. 477, 484 (1981), the Court held that once the interrogation has begun after a *Miranda* advisement, and the suspect then invokes the right to counsel, a valid waiver of Fifth Amendment rights cannot be established by showing only that the accused continued to respond to further police-initiated questions. *Davis* did not overrule either *Miranda* or *Edwards*; rather, the Court

declined to "extend" *Edwards* to "require law enforcement officers to cease questioning immediately upon the making of an ambiguous or equivocal reference to an attorney." *Davis*, 512 U.S. at 459. The Court encouraged but did not require clarification of a suspect's ambiguous reference. *See id.* at 461.

Here, the trial court engaged in a totality of the circumstances analysis under *Davis* in ruling that Romero sufficiently expressed his desire for the assistance of legal counsel. In light of the record, we defer to the trial court's findings and agree with the court's conclusions.

**B.**

**The Trial Court's Totality of the Circumstances Analysis**

The trial court properly engaged in a totality of the circumstances analysis. *Cf. People v. Trujillo*, 938 P.2d 117, 123 (1997) (issue of custodial interrogation is for trial court to determine based on totality of the circumstances); *see also People v. D.F.*, 933 P.2d 9, 14 (Colo. 1997) ("We,

like the trial court, review the totality of the circumstances in reaching the ultimate legal conclusion in suppression order cases.").

The question before us is a mixed issue of law and fact. *See People v. Quezada*, 731 P.2d 730, 732 (Colo. 1987) ("In reaching a decision on a motion to suppress a custodial statement, a court must engage both in factfinding-a specific inquiry into the historical phenomena of the case-and law application, which involves the application of the controlling legal standard to the facts established by the evidence."). The trial court must assess the reliability of evidence and credibility of witnesses while making an independent assessment of whether the suspect "sufficiently clearly" invoked the right to counsel based on the totality of the circumstances. When sufficient evidence exists in the record to support the trial court's findings of fact, we defer to those findings. *See People v. MacCallum*, 925 P.2d 758 (Colo. 1996); *Quezada*, 731 P.2d at 732-33; *People v. Fish*, 660

P.2d 505, 509 (Colo. 1983). The trial court's legal conclusion is subject to our de novo review. *See Quezada*, 731 P.2d at 732-33 (ultimate conclusion of constitutional law that is inconsistent with or unsupported by evidentiary findings is subject to correction by reviewing court).

Following an evidentiary hearing, including review of the tape recording and transcript of the custodial interrogation, the trial court entered oral and written rulings that Romero's statement, "I should talk to a lawyer . . . because I do want to go to trial on this," was a sufficient request for legal counsel under the totality of the circumstances. The record on review demonstrates that the trial court properly considered the following factors in determining that Needham had sufficient reason to believe that Romero had invoked his right to counsel: (1) the words spoken by the interrogating officer; (2) the words used by the suspect in referring to counsel; (3) the officer's response to the suspect's reference to counsel; (4) the speech patterns of the suspect; (5) the content of the interrogation; (6) the

demeanor and tone of the interrogating officer; (7) the suspect's behavior during interrogation, (8) the point at which the suspect invoked counsel; and (9) who was present during the interrogation. *Cf. People v. Trujillo*, 938 P.2d 117, 124 (Colo. 1997) (employing similar factors in determining the issue of custodial interrogation).

The trial court found that Romero affirmatively stated his desire to talk to a lawyer in light of the questions being asked about his self-defense rationale. He invoked his right to counsel within minutes after being delivered the *Miranda* advisement. He did not make accompanying ambiguous or contradictory statements. His statement occurred in immediate response to questions directed by the custodial interrogator at ascertaining his involvement in the shooting and his mental state with regard to the crime.

Made at a critical and early point in the interrogation, Romero's remark demonstrated his intent to defend himself through counsel in light of the questions being asked.

Though courteous and businesslike in tone, Needham ignored Romero's desire for counsel and instead proceeded quickly with an examination designed to elicit details which might overcome Romero's self-defense claim. Under these circumstances, the trial court did not believe that the officer conducting the questioning "reasonably [did] not know whether or not the suspect want[ed] a lawyer." *Davis*, 512 U.S. at 460.

Upon reviewing the record, we agree with the trial court's conclusions. Police officers and judicial officers serve a diverse community. The trial court must determine what weight to give to the officer's testimony at the suppression hearing and need not defer to the officer's view of what occurred in the interrogation. As we recognized in *People v. Harris*, 191 Colo. 234, 236-37, 552 P.2d 10, 12 (1976), citizens under custodial interrogation will speak in their own tongues under circumstances that are inherently stressful:

> The defendant made a request for an attorney, and the police officers were thereby placed on notice that the defendant intended to exercise his constitutional rights. Admittedly, the demand was not in the most sophisticated or legally proper form, but it was adequate. At that point, all interrogation should have ceased until an attorney was made available to the accused. The fact that the accused did not "demand" an attorney does not persuade us that he was not exercising his rights. The accused was young, timid, and inexperienced in such situations; his failure to make a forceful demand for counsel does not dilute the fact that he made a request.

The interrogating officer testified at the suppression hearing that he did not understand Romero to be requesting counsel because he did not plainly use the words, "I think I should talk to a lawyer," or "I want a lawyer," or "something along those lines." But, the import and effect of a suspect's phraseology in requesting counsel does not depend on the officer's subjective preference for word choice. The legal standard is objective-whether in the context of question and answer, the suspect's responses reasonably could be construed by a police officer to mean that the suspect wanted a lawyer.



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The court in *Davis* observed that a suspect need not "'speak with the discrimination of an Oxford don'" but must "articulate his desire to have counsel present sufficiently clearly." *Davis*, 512 U.S. at 459 (quoting *id.* at 476 (Souter, J., concurring)). The trial court in applying *Davis* properly took into account Romero's pattern of speech. Romero punctuated his responses with expletives and slang, such as "ya know," "uh," "dude," "this and that," "I was like," and "I don't know." He started sentences with "so," "well," or "'cause," leaving off either the subject or both the subject and verb and splicing sentences with "ya know." Romero repeatedly said, "I'm not gunna lie man," and, "I'm straight up man," in trying to justify himself to the police. For example, at one point, he stated: "I didn't [expletive] do this out of ya know anger or nothing like that, ya know, I mean I'm straight up man, I think I did this out of self-defense, whether anyone believes that or not."

Romero's full statement invoking counsel for the first time was: "Yea. Cause I, ya know, I'm not gunna lie man, ya know, I mean I should wait, and I should talk to a lawyer and this and that and ya know because I do want to go to trial on this."

We will not substitute our judgment for that of the trial court on factual issues relating to the suppression of the defendant's statements. *See Harris*, 191 Colo. at 236, 552 P.2d at 12. The trial court analyzed Romero's statement in its contextual circumstances and considered Needham's testimony at the evidentiary hearing that Romero was in effect saying, "I know I should talk to a lawyer, but I'm going to tell you what happened." The trial court did not accept Needham's explanation. Rather, the court determined that Needham elected to proceed with an effort to have Romero incriminate himself, despite a sufficiently clear request for counsel, through Needham's rapid progression from Romero's "I should talk to a lawyer" to Needham's "Did you think you'd have a valid point?" The trial court

observed that "[t]he fact that the defendant wanted to tell his story does not negate the fact that he requested an attorney."

The word "should" means "to express duty, obligation, necessity, propriety, or expediency," *Webster's Third New International Dictionary* 2104 (1961) (meaning 2), and also "to express a desire or request in a polite or unemphatic manner," *id.* (meaning 6). An archaic definition of "should" is "might" or "could." *Id.* (meaning 4). The trial court concluded that Romero's statement, "I should talk to a lawyer," reasonably conveyed that the interrogating officer should provide him with an attorney in light of the questioning. Referring to prior cases in which the suspect had sufficiently invoked the right to counsel, the trial court found that, "it is obvious that the language chosen by Mr. Romero was far clearer than in some of these cases and impossible to distinguish from others."

We previously have held that a suspect unambiguously requested counsel when she said, "I think I better have a

lawyer." *People v. Cerezo*, 635 P.2d 197, 199 (Colo. 1981). In *People v. Traubert*, 199 Colo. 322, 328, 608 P.2d 342, 346 (1980), the defendant's statement, "I think I need to see an attorney," was a sufficiently clear assertion of the right to counsel. In *People v. Harris*, 191 Colo. 234, 235-37, 552 P.2d 10, 11-12 (1976), the defendant asked interrogating detectives, "When can I get a lawyer?" This, too, was adequate. In light of *Davis*, we reaffirm such invocations of the right to counsel as being sufficiently clear for Fifth Amendment purposes.

The right to the assistance of one's own attorney during questioning is a primary corollary to the constitutional privilege not to incriminate oneself. This constitutional right is not restricted to citizens who are sophisticated in the use of attorneys and accustomed to their availability. *See Miranda*, 384 U.S. at 472. When invoking the right to counsel during custodial interrogation, a person may **demand** an attorney, a person may **ask for** an attorney, or

a person may make some statement which can "reasonably be construed to be an expression of a desire for the assistance of an attorney." *Davis*, 512 U.S. at 459. When any of these occurs, the police need not provide "instant counsel" but must cease the questioning and provide a reasonable opportunity for the person to consult counsel. *See Harris*, 191 Colo. at 237, 552 P.2d at 12-13.

Upon review of the record, we determine that the evidence supports the trial court's findings, and we hold that Romero reasonably conveyed his desire for the assistance of counsel in light of the interrogating officer's questions.

III.

Accordingly, we affirm the district court's order suppressing oral and written statements and return the case for further proceedings consistent with this opinion.

JUSTICE MULLARKEY dissents.

*The People of the State of Colorado v. Mario Romero*
No. 97SA311

JUSTICE MULLARKEY dissenting.

The defendant in this case, Mario Romero (Romero), is charged with first degree murder and related crimes[1] resulting from the shooting death of Joe Cervantes. The issue before us is whether the trial court properly suppressed statements made by Romero during the course of a custodial interrogation conducted after Romero had been advised of his *Miranda*[2] rights and after he had voluntarily waived those rights. The trial court found that Romero asserted his right to counsel after the interrogation began. On that basis, the court suppressed Romero's subsequent statements and the majority upholds the suppression order. I respectfully

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[1]The crimes charged are: murder in the first degree, *see* § 18-3-102(1) (a), 6 C.R.S. (1997); criminal attempt to commit murder in the first degree, *see* § 18-2-101, 6 C.R.S. (1997); accessory to crime, *see* § 18-8-105(1) - (2), 6 C.R.S. (1997); murder in the first degree, *see* § 18-3-102(1) (d); mandatory sentence for violent crimes, *see* § 16-11-309, 6 C.R.S. (1997).

[2]*See Miranda v. Arizona*, 384 U.S. 436 (1966).

dissent. Under *Davis v. United States*, 512 U.S. 452 (1994), these statements should not be suppressed.

I.

As an initial matter, I disagree with the deferential standard of review adopted by the majority. *See* maj. op. at 11, 12. While we defer to a trial court's findings of disputed fact, the application of a legal standard to historical fact is a matter for *de novo* appellate review. *See People v. Gennings*, 808 P.2d 839, 844 (Colo. 1991); *People v. Quezada*, 731 P.2d 730, 732-33 (Colo. 1987); *see also United States v. Fike*, 82 F.3d 1315, 1324 (5th Cir. 1996) (stating that whether Miranda guarantees have been violated is a matter of constitutional law, meriting *de novo* review). As we stated in Quezada:

> A court's findings of historical fact are entitled to deference by a reviewing court . . . . An ultimate conclusion of constitutional law that is inconsistent with or unsupported by evidentiary findings, however, is subject to correction by a reviewing court, as is a court's application of an erroneous legal standard to the facts of the case.

*Quezada*, 731 P.2d at 732-33.

Although the majority twice states that it defers to the trial court's findings, *see* maj. op. at 11, 16, the court actually made no findings on disputed issues of fact. We sit in the same position as the trial court did when it evaluated the transcript and audiotape of the interrogation. The *Davis* decision did not rest on a deferential standard of review. Rather, the Court reached its own conclusion that the defendant's statement, "Maybe I should talk to a lawyer," was not a request for counsel. *See Davis* at 462. Thus, the question of whether Romero's reference to counsel was sufficient under *Davis* to invoke his right to counsel is a conclusion of law to which I would apply a *de novo* standard of review.

II.

Under the Fifth Amendment to the United States Constitution, the privilege against self-incrimination includes the right to have a lawyer present during custodial

interrogation. *See Miranda v. Arizona*, 384 U.S. 436, 473-74 (1966); U.S. Const. amends. V, XIV. In *Edwards v. Arizona*, 451 U.S. 477, 482 (1981), the Supreme Court, drawing a "bright line" prophylactic rule, held that law enforcement officers must immediately cease questioning a suspect who has clearly asserted his right to have counsel present during custodial interrogation.

In *Davis*, 512 U.S. at 459-60, however, the Supreme Court refused to extend *Edwards* to require law enforcement officers to cease questioning immediately upon the defendant's ambiguous or equivocal reference to an attorney. The Supreme Court held that if the suspect's statement is not an unambiguous or unequivocal request for counsel, law enforcement officers are not required to stop questioning or even to clarify whether the suspect is requesting counsel. *See id.* at 461-62.

Prior to *Davis*, our Colorado case law established that when a suspect made an ambiguous reference to counsel that

reasonably could be considered a request for counsel, the interrogating officer had a duty to cease questioning, except for limited questioning that would clarify the suspect's intent concerning the presence of counsel. *See People v. Kleber*, 859 P.2d 1361, 1364-65 (Colo. 1993). However, *Davis* explicitly rejected the clarification requirement and thus, overruled, in part, *Kleber* and related cases. As a consequence. the Fifth Amendment does not require an interrogating officer to clarify or to stop questioning when a suspect makes an ambiguous or equivocal reference to counsel. *See Davis*, 512 U.S. at 461-62. "Rather, the suspect must **unambiguously** request counsel," *id.* at 459 (emphasis added), in order for questioning to cease.

Stated in other words, after *Davis*, interrogation must cease only if the suspect makes "a clear assertion of the right to counsel." *See Davis*, 512 U.S. at 460. Thus, the Supreme Court placed the burden on the suspect to make known his or her change of mind after initially waiving the

right to counsel. It explained that the fact that a suspect may be unable to make a clear assertion because of fear, poor language skills, or any other reason is immaterial because the suspect has had the primary protection of the *Miranda* warnings themselves and has freely chosen to speak to the police officers. *See id.* at 460- 61.

The concurring justices in *Davis* criticized the majority for unfairly placing a "demand of heightened linguistic care" on the suspect. *See Davis*, 512 U.S. at 469 (Souter, J., concurring in judgment). The concurrence rejected the majority's "theory that so long as the burden to demonstrate waiver rests on the government, it is only fair to make the suspect shoulder a burden of showing clear subsequent assertion." *See id.* at 471. Unlike the concurrence, we cannot reject the *Davis* majority. In my view, *Davis* is a significant change in the applicable legal standard.

The test now is whether the suspect made a clear, unambiguous request for counsel, *i.e.*, whether a reasonable

police officer in the circumstances would understand the statement to be a request for an attorney. *See Davis*, 512 U.S. at 459. A totality of the circumstances analysis is applicable to suppression order cases and "we, like the trial court, review the totality of the circumstances in reaching the ultimate legal conclusion in suppression order cases." *People v. D.F.*, 933 P.2d 9, 13 (Colo. 1997); *see* maj. op. at 12. These circumstances include the tone of the interrogator and the atmosphere surrounding the interrogation. *Cf. D.F.*, 933 P.2d at 14 (reviewing the videotape of the interrogation and considering the officer's demeanor and conduct in determining whether police officer's conduct was coercive); *People v. Dracon*, 884 P.2d 712, 719 (Colo. 1994) (reviewing the totality of the circumstances including the videotaped interrogation and noting that the detective displayed a stern demeanor and serious tone and was confrontational).

## III.

In applying the relevant legal test to the facts of this case, I reach a different result from that of the majority. It is uncontroverted that the initial *Miranda* advisement in this case was sufficient and that Romero's initial waiver of his *Miranda* rights was valid. The trial court held that Romero's statements were voluntary and not the product of coercion or promises. In fact, the majority acknowledges that the tone of Needham was courteous. *See* maj. op. at 14. The relevant part of the interrogation is as follows:

> Needham: So what were you thinking when that gun went off?
>
> Romero: I don't know, I, I, I just don't know man, I was just [expletive deleted], I was in fear man, for my life because they're, my kids were there, Vida's pregnant from me, ya know, I mean . . .[3]
>
> Needham: So you thought you were defending yourself when you shot at the car?
>
> Romero: Yea. Cause I, ya know, I'm not gunna lie man, ya know, I mean I should wait, and I should talk to

---

[3]At this point in the audiotape, Romero stops speaking and there is a brief pause before Needham continues. The ellipsis is in the original transcript apparently to indicate the pause.

a lawyer and this and that and ya know because I do want to go to trial on this.

Needham: Did you think you'd have a valid point?[4]

The majority construes Romero's reference to a lawyer to be an assertion of his right to counsel. It states, "Needham ignored Romero's desire for counsel and instead proceeded quickly with an examination designed to elicit details which might overcome Romero's self-defense claim." Maj. op. at 14.

In my opinion, the statement does not meet the *Davis* standard of a clear, unequivocal assertion by Romero of his right to counsel. In applying the totality of the circumstances analysis, I do not agree with the majority's characterization of Needham as ignoring Romero's desire for counsel and quickly proceeding with an examination. *See* maj. op. at 14. Of course, the majority's characterization of the conversation is subjective, but the audiotape discloses

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[4]Romero responds, "I think I do" and continues speaking.

nothing hurried about Needham's questioning. Contrary to the majority's implication, Romero had ample opportunity to make any statement he chose. As I note in footnote 4, there is a pause in this critical portion of the interrogation while Needham waits for Romero to finish his sentence and only begins speaking after Romero's voice trails off into silence. This exchange is typical of the tone of the interrogation. Needham is courteous and low key throughout.

What the majority omits from its totality of the circumstances analysis is any assessment of how a reasonable police officer would have interpreted Romero's remark. Officer Needham testified, "In the totality of everything that has gone on in this particular interview at this particular time, it was not my impression that he wanted to see a lawyer to consult with at the time of the interview." The question is whether Needham's understanding was reasonable. I would conclude that it was a reasonable interpretation. Romero's statement is subject to at least two interpretations. One is Needham's understanding that

Romero was acknowledging that he knew he should talk with a lawyer but that he had decided to go ahead and speak with Needham. He hoped to convince the officer that he acted in self-defense. The other interpretation is that endorsed by the majority, an interpretation made by excerpting and emphasizing certain words which do not stand out in the audiotape. *See* maj. op. at 4, 17. Romero's statement does not meet the "unambiguous or unequivocal" test we are required to apply under *Davis*. *See Davis*, 512 U.S. at 461-62. Rather, it is the quintessential equivocal statement.[5] In my view, it is entirely unrealistic to ask a police officer to distinguish between the statement in Davis--"Maybe I should talk to a lawyer"--which the Supreme Court held was **not** a request for counsel and the statement in this case- -"I should talk to a lawyer"--which the majority holds was a request for counsel.

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[5]"Equivocal" means "having two or more significations: capable of more than one interpretation." *Webster's Third New International Dictionary* 769 (1986).

Accordingly, I respectfully dissent.

## APPENDIX B

**DISTRICT COURT, COUNTY OF ALAMOSA, COLORADO**
**Cr. Action No. 97-CR-47**

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**ORDER**

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**THE PEOPLE OF THE STATE OF COLORADO,**

**Plaintiff,**

**v.**

**MARIO ROMERO,**

**Defendant.**

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**THIS MATTER** is before the court for consideration of the Defendant's Motion to Suppress. The State is represented by the District Attorney, Robert Pastore. The Defendant is represented by Peter Comar.

### I. BACKGROUND & FINDINGS

The Motion to Suppress was heard on August 25, 1997. The court made brief findings on the record and ruled from the bench. This written order supplements the oral findings and analysis. To the extent that there is any conflict between the oral statements and this order, the written order is intended to be the courts finding. The court has considered the recorded oral statement of the defendant and the testimony taken at the hearing.

The defendant is charged with murder in the first degree. On the date of Mr. Cervantes' death, the defendant was at his residence with his children, wife and a friend, Jesse Ortega. A vehicle pulled up in front of the house and several people allegedly exited the vehicle. The defendant and Ortega recognized the car and some of the occupants. The defendant and Ortega had been in several confrontations with these individuals prior to the date of the shooting. The defendant retrieved a rifle he had at the house and two shots were fired. It appears that the first shot was the one which caused the death of Mr. Cervantes. The defendant has acknowledged firing the shots but alleges it was done in self-defense. The photographs introduced by the state [Exhibits 2 & 3] suggest that the bullet entered the side of the vehicle as it was driving away and that the bullet passed through the car diagonally killing Mr. Cervantes in the front seat.

The defendant fled the scene after the shooting. He was apprehended in Adams County. Detective Richard Needham interrogated Mr. Romero at the Adams County Jail. There is no question that the defendant was in custody and was subjected to a custodial interrogation. He was given an oral advisement pursuant to Miranda and executed a written waiver of rights. Defendant has not contended that the advisement was deficient or that his initial agreement to speak was not a knowing, intelligent and voluntary wavier of his right to an attorney and to remain silent. The interrogation was taped. There were no threats or promises made before or during the taped interrogation and the preparation of the written statement.

At the outset it is clear that the defendant was anxious to tell the officer that he had acted in self-defense of others. The detective gave him that opportunity with the general question, "Tell me about that, what happened Thursday?" The defendant described how he and his friend were just sitting around "just getting faded" when a car pulled up at

his house. He mentioned the fact that the people in the car were members of a gang and that he had prior conflict with them which made him fearful for wife and children as well as himself.

At this point the Detective and the defendant have the following exchange(Transcript page 3):

> Detective Needham: "So you thought you were defending yourself when you shot at the car?"
> Mario Romero: "Yea. Cause I, ya know, I'm not gonna lie man, ya know, I mean I should wait, and I should talk to an attorney and this and that ya know because I do want to got to trial on this."

The detective ignored the response in what he testified was a conscious decision that this was not an adequate request for counsel under *Edwards v. Arizona* and *Davis v. United States*. Nor did not give the defendant time to elaborate on his own as he had done at the outset of the questioning. Instead, he immediately posed another question, "Did you think you'd have a valid point." The defendant responded to this and subsequent questions.

Later in the interview, the accused again refers to an attorney. After the detective expresses that he is not impressed with the self-defense argument of the defendant, the defendant and detective have the following exchange [Transcript page 35]:

> Mr. Romero: "I still won't be, I mean, look I already fucken, see I don't even understand this man, cause..."
> Detective Needham: "Okay, what don't you understand?"
> Mr. Romero: "People telling me that I shouldn't fucken talk to you guys."

Detective Needham: "Well I think by talking to us..."
Mr. Romero: "That I should talk to a lawyer first..."
Detective Needham: "Well you made the choice."

The detective then went on to say he had been thinking of charging murder in the first degree but now "..I'm thinking maybe second or something else." The interrogation then proceeded again. The defendant completed a written statement, and was asked a few additional questions. The entire interrogation lasted almost exactly two hours. The defendant was then charged with murder in the first degree.

## II. VOLUNTARY STATEMENTS

Statements stemming from custodial interrogation may not be used against a defendant unless the state demonstrates that the defendant was warned adequately of his privilege against self-incrimination and his right to counsel and, thereafter, voluntarily, knowingly and intelligently waived those rights. *Miranda v. Arizona*, 384 U.S. 436 (1966); *People v. Spring*, 713 P.2d 865 (Colo. 1985); *People v. Hopkins*, 774 P.2d 849 (Colo. 1989); *People v. Mack*, 895 P.2d 530(Colo. 1995).
In addition, any statement must be given voluntarily and not as the result of coercion or pressure or promises.

"In ruling on a motion to suppress a confession or inculpatory statement, a court must engage in both fact finding and law application." *People v. Gennings*, 808 P.2d 839, 844 (Colo. 1991); *People v. Kleber*, 859 P.2d 1361(Colo. 1993). Factual findings should set out the basis of the decision of the court.

Generally, it is desirable to address whether there was a knowing and intelligent waiver of the Constitutional rights and then turn to whether the statement was voluntary. In this case I will address the issue of voluntariness first.

Statements are voluntary if they are the product of an individual's free and rational choice. *Greenwald v. Wisconsin*, 390 U.S. 519, 521 (1968), *People v. Jesus Manuel Mendoza-Rodriguez*, 790 P.2d 810 (Colo. 1990). "(C)oersive police activity is a necessary predicate to the finding that a confession is not 'voluntary.'" *Colorado v. Connelly, supra* at 167. In reviewing the circumstances and determining the voluntariness of any statement, a trial court must consider all of the circumstances surrounding the making of the statement. *People v. Freeman*, 668 P.2d 1371 (1983), *Clewis v. Texas*, 386 U.S. 707, 708. (1967); *People v. May*, 859 P.2d 879(Colo. 1993). *People. v. Dracon*, 884 P.2d 712 (Colo. 1994).

The court has considered the "totality of the circumstances" in reaching a determination on the waiver of rights. Any waiver of Constitutional rights must be "knowing, intelligent and voluntary." "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). An inquiry into the validity of any such waiver encompasses two dimensions as set forth in *People v. Hopkins*, 774 P.2d 849, 851 (Colo. 1989):

> "First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness, both of the nature of the right being abandoned and the consequences of the decision to abandon it"

The burden is on the prosecution to prove by a preponderance of the evidence that the statement was made voluntarily. *Lego v. Twomey*, 404 U.S. 477, 489 (1972), *Jackson v. Denno*,378 U.S. 368 (1964), *People v. DeBaca*, 736 P.2d at 27, *People v. Jesus Manuel Mendoza-Rodriguez*, supra; *Colorado v. Connelly*, 479 U.S. 157, 168 (1986); *Hopkins*, 774 P.2d at 852; *People v. May*, 859 P.2d 879(Colo. 1993).

Here the defendant was properly advised of his Miranda rights. He made a clear choice to waive his rights under Miranda and speak with the officers. The atmosphere was "friendly" and conversational as that was the interrogation technique with which he was approached. There were no threats or promises. Towards the end of the interrogation the defendant points out that he has been cooperative and reaffirms that there have been no threats or promises. The totality of evidence presented shows that the statements at the Adams County Jail were "voluntary" within the meaning of the Due Process Clause of the **Fourteenth Amendment.** The statements were not the product of coercion or promises. In sum, all of the statements are voluntary.

## III. RIGHT TO COUNSEL

There is no question that if a suspect waives his rights to counsel after a valid Miranda advisement, law enforcement officials are free to question him. *North Carolina v. Butler*, 441 U.S. 369, 99 S. Ct. 1755 (1979). But if, after waiving the right to counsel, an accused requests counsel during the interview, he is not subject to further questioning until a lawyer has been made available or the suspect himself reinitiates conversation. *Edwards v. Arizona*, 451 U.S., at 484-485, 101 S. Ct., at 1884-1885. In order to invoke the right to counsel, "requires at a minimum, some statement that can reasonably be construed

to be an expression of a desire for the assistance of an attorney." *McNeil v. Wisconsin*, 501 U.S. 171, 176, 111 S. Ct. 2204,2208 (1991).

Inevitably there are instances in which the question is whether or not the accused is making an unambiguous request for an attorney. "A statement either is such an assertion of the right to counsel or it is not." *Smith v. Illinois*, 469 U.S., at 97-98, 105 S.Ct., at 494.

Prior to *Davis v. United States*, 512 U.S. 452, 114 S. Ct. 2350 (1994), the majority of courts had required law enforcement officers to cease questioning immediately after the making of a statement which could be construed as ambiguous or equivocal. This was the clear rule in Colorado. *People v. Kleber*, 859 P.2d 1361 (Colo. 1993). In *Kleber*, the Colorado Supreme Court reiterated the standard it had adopted in *People v. Benjamin*, 732 P.2d 1167 (Colo 1987) and which was taken from a line of federal cases represented by *Thompson v. Wainwright*, 601 F.2d 768 (5th Circuit 1979).

> "..when an accused makes a statement that might reasonably be construed as a request for counsel, interrogation must cease immediately except for very limited questions designed to clarify the accused's wishes regarding the presence of counsel."

*Davis* makes clear that this line of cases is overruled and that:

> "If a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking

> the right to counsel, our precedents do not require the cessation of questioning."

The *Davis* ruling occurred in a factual circumstance in which the police very carefully followed the guidelines set out above in *Kleber*. An hour and a half into the interview, the accused had said, "Maybe I should talk to an attorney." The word "maybe" is inherently ambiguous. The accused's statement was admitted at the court martial and the defendant appealed challenging the rule represented by *Kleber*. The Court took the opportunity to draw a "bright line." Not only was the procedure actually used permissible, it was unnecessary. The officers could simply ignore the equivocal statement, "maybe."

In this case, Detective Needham had read the case law in this area including *Edwards* and *Davis* and testified he understood the defendant's statement that "I should get a lawyer." to be ambiguous and that he purposefully ignored the statement and quickly asked another question. The detective points out that the interrogation was friendly in tone and that the defendant seemed anxious to share his belief that he acted in self-defense.

In evaluating whether the defendant's statement that "I should get an attorney." is sufficiently clear" the court must look at the totality of the circumstances.

> "Although a suspect need not 'speak with the discrimination of an Oxford don,' post, at 2364 (Souter, J., concurring in judgement), he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney."*Davis*, at 457.

In light of the totality of circumstances, the court concludes that Mr. Romero's statement. was an unambiguous request for an attorney. It was made shortly after the questioning began with his rights firmly in mind. He had declared his actions were in self-defense. Initially the detective asked open-ended questions that let the defendant talk. The detective then asked two specific questions seeking to obtain evidence of *mens rea*. It is at this point that the defendant states, .. "I should get an attorney."

The Colorado Supreme Court has previously visited the question of what constitutes an unambiguous request for an attorney. A request for counsel need not be sophisticated or in legally proper form. *People v. Cerezo*, 635 P.2d 197 (Colo. 1981). The Court found the words, "I think I need to see an attorney." to be sufficiently clear in *People v. Traubert*, 199 Colo. 322, 608 P.2d 342 (1980). In *Cerezo*, the court found the words, "I think I better have a lawyer." sufficient. In *People v. Harris*, 191 Colo. 83, 552 P.2d 10 (1976), the defendant asked, "When can I get a lawyer?" That was held sufficiently clear. And in *People v. Richards*, 194 Colo. 83, 568 P.2d 1173 (1977), the defendant indicated he "would rather talk to an attorney first." Again the court held this was unequivocal under *Edwards*. In *People v. Fish*, 660 P.2d 505 (Colo. 1983), the defendant asked the police if he needed an attorney after being Mirandized. The court found that this question "was sufficient to put the officers on notice that the defendant intended to exercise his right to counsel and his right against self-incrimination." In *Cannady v. Dugger*, 931 F.2d 752 (11th Cir. 1991), the circuit court found the defendant's statement, "I think I should call my lawyer" unequivocal. As in the case before this court, the statement was ignored and further questioning occurred.

In each of these cases, the court faced the same issue this court does. The circumstances in each is slightly different but in each case, police ignore the defendants' requests, statements or question and proceeded to interrogate the accused. Our Supreme Court and the Eleventh Circuit found that the language used by each accused was "sufficiently clear" and unequivocal. While the court must look at the totality of circumstances for each case, it is obvious that the language chosen by Mr. Romero was far clearer than in some of these cases and impossible to distinguish from others. The subjective view of the detective at the time or in justifying his actions at the hearing are not relevant. The standard is objective as set out above in the quote from *Davis*. Would a reasonable officer in light of the circumstances find the words, "...I should get an attorney...." a request for counsel sufficiently clear under *Edwards*? "I should get an attorney." is a clear, unequivocal declaration. It was the expression of a desire for an attorney. *See*: *McNeil*, *supra*. The fact that the defendant wanted to tell his story does not negate the fact that he requested an attorney.

Having concluded the accused invoked his right to counsel and was ignored, it is clear that the oral and written statements made after the request for counsel must be suppressed under *Edwards* and *Davis*. The initial statements prior to the request are admissible since the defendant initially agreed to speak to the officers and waived his right to counsel and to remain silent.

In view of the court's conclusion that his first request for counsel was unequivocal, it is not necessary to address the second mention of counsel quoted in the findings.

FOR THE REASONS STATED, THE COURT CONCLUDES THAT ALL STATEMENTS WERE

VOLUNTARY. THE COURT FURTHER FINDS THAT THE ORAL AND WRITTEN STATEMENTS AFTER THE DEFENDANT ASKED FOR AN ATTORNEY MUST BE SUPPRESSED. THE STATE MAY NOT INTRODUCE THE SUPPRESSED PORTION OF THE STATEMENTS BUT MAY USE THEM FOR CROSS EXAMINATION IF THE DEFENDANT TESTIFIES.

**DONE AND SIGNED THIS 29TH DAY OF AUGUST, 1997.**

**BY THE COURT**

s/s O. John Kuenhold

**O. JOHN KUENHOLD**
**DISTRICT JUDGE**

**Certificate of Mailing**

**I hereby certify that I have served the forgoing document by mailing or delivery of the same to the following individuals this September 2, 1997:**

Mr.Robert L. Pastore
District Attorney
418 State Avenue
Alamosa, CO 81101

Mr. Peter L. Comar
Attorney at Law
537 Main Street, Suite B
Alamosa, CO 81101

s/s Judy Lawrence

## APPENDIX C

Mario Romero Interview. Present: Investigator Rick Needham and Officer M. Shawn Woods

Rick Needham: Time is 1354, we're at Adams County Jail with Mario Romero. Um, first, you do have a right to remain silent anything you say can and will be used against you in a court of law. You have the right to talk to a lawyer and have him present with you while you're being questioned. If you cannot afford to hire a lawyer, one will be appointed to represent you before any questioning if you wish. You can decide at any time to exercise each rights and not answer any questions or make any statements. Do you understand everything I read to you?

Mario Romero: Yes

RN: Any questions regarding those? You can decide at anytime to exercise these rights. That means I ask you a question and you don't want to answer it...

MR: I don't have to answer? Ok, alright.

RN: I'm not going to slap you up side the head and hit..We don't have any rubber hoses or anything else today okay. The waiver of card is that I have read the above rights and understand each of those, is that true?

MR: Yea.

RN: Okay having those rights in mind when answering these questions for us. Okay. Sign here for me.

Took care of that.

Rick Needham: So how did you get up to Denver?

Mario: Um, one of my friends.

RN: Who? Who brought you up? Just curious.

Mario: One of my friends.

RN: Pat?

Mario: Yea.

RN: And Vida?

Mario: Yea.

RN: See. What time was it? So you knew you were wanted didn't ya?

Mario: Oh yea, fucken scag, for what happened Thursday.

RN: Tell me about that, what happened Thursday.

Mario: Well, actually I was just sitting at home, I was drinking, I drank like around 3 to 6 pints of uh Kentucky, Kentucky Deluxe. Ya know, cause I stay home and I watch the kids and before that like about I'd say

around 3 or 4 days before that, uh I was with one of my friends named Jesse, the one that was with me that night. I'm no gang member or nothing like that. But uh, anyway ya know we were just kicking back and these fools would come by, the Eastside Gang, whatever name they are. I know them, ya know from before, cause when I first came to Alamosa, ya know, I know, I know uh Angel and Margo, ya know and they were my friends before they were even with them guys, ya know, so I partied with them a couple of times ya know, everything was cool, ya know, got along with them and shit like that, cause they party out at the Ranch. Ya know, so I didn't, ya know, I lived in Alamosa, I was working at uh Aspen Homes for a while, alright. And I was just trying to get my shit together, even though I had this probation violation and shit ya know. But ya know I wasn't trying to start no shit, ya know, cause in Alamosa everyone knows each other.

RN: Right.

Mario: Ya know and ya know we were just getting faded and these fools would come by my house talking about we're gunna kill you and this and that, ya know, and that was the reason for the gun, ya know that's why I had my ya know, father's gun. Ya know, and the next thing I know is they're getting out of cars and shit ya know and just..It was just fucken..fucked up man.

RN: So what were you thinking when that gun went off?

Mario: I don't know, I,I,I just don't know man, I was just fucken, I was in fear man, for my life because they're, my kids were there, Vida's pregnant from me, ya know, I mean...

RN: So you thought you were defending yourself when you shot at the car?

Mario: Yea. Cause I, ya know, I'm not gunna lie man, ya know, I mean I should wait, and I should talk to a lawyer and this and that and ya know because I do want to go to trail on this.

RN: Did you think you'd have a valid point?

Mario: I think I do, man, because, ya know, I mean because check this out man, I went to their house the night before, like two nights before that, and I was like, cause it was me, Jamie and Jesse, we went to their house and we're like hey dudes, ya know, we're not no gang, but we want to be your friends, we don't want no trouble with you guys, ya know, and they right away thought that we went over to fucken trying to start trouble, ya know, and we didn't bro. Ya know we went over there because we all have kids, ya know what I'm saying, except for Jamie. And I don't want no one bringing nothing to my house, ya know, and right where we live everyone goes in and out of Alamosa ya

know, they're either coming in from what La Jara or where ever else or they're going. Ya know. So we see everyone that comes in and out.

We went over there and anyways, fucken they started all panicking, all fuck that, we don't need, fuck you, why did you guys even come here. I was just like alright we'll just leave. So we left. Ya know. And then uh, just like a couple of days after that, that's when this happened. But the day before this happened, uh I don't know what kind of car that was...was it a Lumina or something?

RN: The one that you shot at?

Mario: Yea. That same car came by my house and see, I guess they were going by, uh things have been going on with that Eastside Gang, they fucken were throwing shit through Eric's windows, ya know, they were fucken doing, ya know, I mean...I'm sorry that this happened, but hey man, Ya know, I've got kids at my house.

RN: We're going to go into all the details here in a little bit. The first shot that you took, you took two shots, is that right?

Mario: Yea. And the first one missed.

RN: The first one missed?

Mario: I think.

RN: Where was the second shot taken from?

Mario: Inside the house.

RN: The first shot...

Mario: I was inside the house both times.

RN: Okay.

Mario: I didn't go outside at all because, alright we live right here on 10th, what street is this Bell right?

RN: Right.

Mario: Okay, if you're looking this way Bell is right here, no 10th is right here,

RN: Want a map?

Mario: Yea.

RN: Here, I'll draw a map for you. This will be north, okay, your house, stop sign here, um, this is 10th, this is Bell.

Mario: This is my house, right?

Rn: Right.

Mario: Okay..

RN: We'll put your house right like this.

Mario: Okay, this is where they stopped, right here. Okay, here's my front door. Okay.

RN: Just label it door. Just put door on it so we know.

Mario: Okay, that's the door, okay, they stopped right here, here's their car, okay, I don't know how many mother fuckers were with them, but I know there was like at least five or six, and I know they fucken a box full of fucken bottles, but I didn't know if there was anything in them. But I know they started coming up to my house, ya know what I'm saying.

RN: Uh huh.

Mario: And it was just me, Vida was in the back room, back here. So she didn't know what was going on. I was panicking, I pulled out the gun, I know there was, cause there's a big tree, remember where that big tree is at..

Shawn Woods: With a swing?

Mario: Yea, and all I know is that people started coming, ya know.

RN: How many?

Mario: There was like three or four of them coming.

RN: Okay.

Mario: It was dark, ya know, I didn't know if they had..ya know all I knew is fucken that I didn't want them to do nothing, to come into the house, fuck with my kids or ya know..that's the only thing I was worried about was my kids and Vida. Ya know. I wasn't worried about myself. I was, but ya know, I'd rather them take my life then my kids or anyone else.

RN: Okay.

Mario: And ya know then I left after that.

RN: Okay, where did you go?

Mario: I went back this way. I ran around to the house, I went to the alley, there's an alley right here, there's Eric's house, and another house.

RN: What did you do with the gun?

Mario: What did I do with the gun? I gave it to Jesse.

RN: You gave it to Jesse?

Mario: Yea and he fucken, well I threw the fucken thing right here.

RN: What thing?

Mario: The gun case thing and the remember where you carrying the gun in.

RN: The gun case?

Mario: That fucken thing.

RN: Scabbard?

Mario: Yea. And I ran around this way and he had the gun and he put the gun

RN: You gave him the gun?

Mario: Yea. Cause fucken, he's bigger than me, shit, I can't run with that mother fucker. I'd be tripping and shit, cause it was almost taller than me.

RN: So where did you put the scabbard?

Mario: I just threw it over the fence.

RN: And you gave the gun to Jesse?

Mario: Yea.

RN: And where did Jesse go, do you know?

Mario: I don't know, but I fucken was out of there...in a fucken

RN: Where did you go from there?

Mario: I went to my dad's house.

RN: Right.

Mario: And then, I stood..

RN: You talked to Gabe there, you talked to Cristal Rae...

Mario: Gabe and let me see who was all there, Gabe was there, see because I didn't know that fucken I shot anyone.

RN: You just knew that you shot the gun.

Mario: I just knew I shot the gun and I knew that fucken cops would be there.

RN: You said you missed the first shot?

Mario: Well, I wasn't aiming, I was just shooting and shit. Ya know, I shot up in the air and fucken, I was hoping they would leave, but they were still coming, so then I fucken just shot it, because I don't...dude, I swear to God that I never shot a gun in my life, straight up. And ya know, I've been locked up most my life, I'm not lying. I never had... most of my cases are ya know grand theft, or burglary, ya know, I never fucken shot no gun before dude. And I ran dude and fucken the next thing I hear, I fucken heard that fucken, I guess some one had a scanner or something and they're like fuck he's dead. And I was like fuck. I didn't know what to think dude. So I didn't know if I should turn myself in, because this is a serious crime dude ya know what I mean?

RN: Uh huh.

Mario: So the only thing that I thought was I just better leave.

RN: Okay.

Mario: Ya know..

Woods: Did you ever come back to the house?

Mario: No

Woods: We were just curious, did you ever hide under the floor there?

Mario: No. No I never came I never came back to the house.

RN: Have you talked to Jesse since then?

Mario: Uh, uh.

RN: Okay.

Mario: Cause he got arrested that night.

RN: Right. What time did you leave town?

Mario: It was the next day.

RN: So where did you hold up that night? At your dad's?

Mario: At my dad's.

But I can still take this trial right? Even though I talked to you guys?

RN: Sure. You can take it to trial. Cause like you said, you have extenuating circumstances. And the only way that

anybodies gonna know that is by talking to you. You need to get your side of the story out. So when you tell me your side of the story that makes me have to go look and see if I can't verify some of the things that you're telling me. So who did you talk to that night?

Mario: I talked to...

RN: Gabe?

Mario: I talked to Gabe

RN: Cristal Rae

Mario: Cristal Rae, um...basically that's it.

RN: David?

Mario: David, he knew that someone was shot, but he'd didn't know, well see I didn't know, I wasn't for sure, if I shot someone or what, but I knew that something had to have happened, because there were so many cops down there. Ya know...

RN: Did you come out and check us out?

Mario: No, I didn't go outside, fuck that. I stayed inside.

RN: You know your dad is pretty shook up about all of this.

Mario: I know.

RN: Have you talked to him?

Mario: I tried calling him last night but I hung up.

RN: Probably should, he's, I spoke to him yesterday afternoon and he was crying through the most part. When I spoke with him, his son, his rifle, took someone's life. Now he's afraid of the Cervantez' coming back on your brothers. I don't know if you know that.

Mario: I don't even know them people.

RN: Well you went over to their house a couple of nights ago.

Mario: I did?

RN: You said you did. You went over to the Cervantez'.

Mario: No I didn't go to the Cervantez', I went to Angel and Margo's house.

RN: Oh, I see.

Mario: I didn't go to their house. Cause I don't even know them, ya know what I mean, I don't know none of them, East side, the only one's that I know is uh, Pelon, the one's that are with Angel and Margo, they're the only two guys that I know, and Reyes. Ya know. But I don't know them other guys.

RN: What was Jesse going to do with the rifle after you gave it to him?

Mario: Stash it, I don't know.

RN: Did you tell him anything?

Mario: No. I didn't tell him nothing. I just started running.

RN: And you gave him the rifle, threw it at him?

Mario: Well fist I threw it over the fence, and he was like no not right there. I was like well then here. And then fucken I left.

RN: Did you take it up out of the fence or what?

Mario: So I fucken I went, cause I threw it over the fence, and then he was like no not right there, and then I grabbed it and then fucken..

RN: So did you give it to him then?

Mario: Yea.

RN: What was Jesse saying during all of this stuff?

Mario: I don't know cause we were fucked up. We were just trying to fucken protect ourselves and the house and the kids. Cause Alonzo wasn't home.

RN: Who was home?

Mario: Me, Vida, the kids, and Jesse. Cause Jesse was getting ready to leave home, ya know, I was getting ready to go to sleep.

RN: Who noticed these people there?

Mario: Jesse did.

RN: He was the first one that noticed them?

Mario: He got up and he was like hey there's someone parked outside in front, ya know right across the street, I was like well maybe it's just the neighbors, cause usually they park in the front, cause they're older people ya know. And he's like no they're waiting there, they're starting to get out of the car, I was like what. He was like it's the Eastsiders. I was like oh fuck. I was like just wait, what the fuck. And then next thing I know fucken, it happened so quick dude, ya know, I mean, I didn't even have fucken time to think, bro, it was like protect yourself, the kids.

RN: Where did you have the gun at?

Mario: It was in the fucken, in the back.

RN: Where at in the back?

Mario: Under the house.

RN: So did you have to go outside to get it?

Mario: Uh [illegible].

RN: H [illegible] you get under the house from the in[illegible]

Mario: Th[illegible]'s a fucken, there's like a uh, like a fucken, a space, like a under space. You lift it up.

RN: Is that where all those blankets and stuff are at?

Mario: Blankets?

RN: Yea, we went under there and there were some blankets under there. That's why we thought you might of been hiding under there.

Mario: I didn't know about no blankets.

RN: You just had it in a gun case and set it under the house?

Mario: See, cause I was fucken...

RN: How long did it take you to get from where you were at in the living room to go get the gun and then back?

Mario: I don't know

RN: A couple of minutes?

Mario: I was fucken...



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RN: Three minutes, four minutes, Jesse thought three or four, what do you think.

Mario: I think it was probably like three or four.

RN: So about three or four.

Mario: I was all shaking and shit. Cause I thought they were going to surround the house and just fucken start...

RN: You don't have a phone there?

Mario: Uh uh.

RN: Okay. Were these people saying anything?

Mario: The people outside?

RN: Uh huh.

Mario: They were just like fuck yous, they were just saying all, they were all talking at one, ya know what I mean, I really wasn't, I wasn't trying to hear this shit, ya know what I mean.

RN: Okay. What was Jesse saying to them?

Mario: I didn't know if they had a gun or what they had man, but I know they had something. Because they go by, they were going by Abraham's house, ya know like the night before that, ya know just, I mean that's, why do they want ya know go by people's houses starting trouble and

shit. Ya know, I mean I wouldn't do that to them. Ya know. It's just a fucked up circumstance man.

RN: Yes, definitely is. It where all the nonsense gets it. You're not in a gang?

Mario: No, I'm not in no gang.

RN: Okay.

Mario: I have tattoos, but that's when I was younger and just, I mean I was in no gang or nothing. It was just from being locked up. Most of my tattoos are just like my name or..

RN: I see the dots

Mario: I just got that just to fucken get it.

RN: Okay, that means something though. What's that mean, I was told I can't remember.

Mario: No tear drops, mean something, that like Vida-Loca, it just part of Mexican heritage I guess.

RN: Okay. I don't know, I don't see any old Mexicans with three dot tattoos, but I don't know what kind of a heritage it could be.

Mario: I don't know.

RN: Okay. Uh, I lost my train of thought. What did Jesse tell these people, was he egging them on what was he doing?

Mario: He was just telling me shoot them mother fuckers

RN: He was telling you to shoot them?

Mario: Yea.

RN: He told me he said don't shoot, don't shoot.

Mario: No, he was telling me shoot them mother fuckers, shoot them.

RN: You sure of that?

Mario: I swear to God he was telling me shoot them and I kept thinking, ya know, I don't know how to load the gun, ya know.

RN: Why did you get the gun? You were trying to sell it a couple of days before.

Mario: I was just scared man.

RN: Weren't ya? Trying to sell that gun.

Mario: No, cause...

RN: At Eric's house

Mario: No, I was gunna take it back to my dad's.

RN: You wanted $150 bucks for it.

Mario: Uh uh.

RN: You're sure Jesse said that?

Mario: Yea.

RN: Tell me again what he said.

Mario: Shoot them mother fuckers. They're gunna fuck you house up and your kids.

RN: Just like that?

Mario: Yea.

RN: Real calm?

Mario: No, he was saying it fucken, they're coming up to your house, they're coming up to you're house, shoot them.

RN: But you're the one who shot right?

Mario: Yea, I'm the one that shot.

RN: Okay.

Woods: Who loaded the gun? You said you didn't know how to load it.

Mario: He showed me how. He's like put it in that fucken chamber and then cock it back, but he was saying it all so fast, I mean, I don't know...

RN: Which side of you was he standing on?

Mario: On my right side, I was standing on the left side.

RN: The first shot was to the right and the second to the left or what? He was standing on the right side...

Mario: No he was standing, alright the door's right here, we're standing in the doorway right here, he was standing on my right side and I was right here.

RN: Oh, okay. I got ya. Then you shot.

Mario: Uh huh.

RN: Okay, the first one you said missed, you shot, is that right?

Mario: I think and then all I know is that I shot twice.

RN: Okay, so you jacked the round out, the case out. How did you get the case out. Do you know how to do that?

Mario: Don't you fucken, when you fucken, doesn't it just pop out?

RN: Your gun, you tell me.

Mario: I never shot that gun before though.

RN: But you shot it twice, so you had to get another round in there some how.

Mario: I know but I can't remember, cause I was fucked up.

RN: Okay, you said you had how much to drink?

Mario: Like, what, almost 5 about 5 pints of uh Kentucky Deluxe.

RN: Five pints? In how long of a time period?

Mario: I'd say around four hours, three hours.

RN: And that was you and Jess drinking?

Mario: No, that was me. And then I drank a pint with Jesse. And like the day before that I drank like maybe eight pints.

RN: That's a lot of booze. Where are you getting all the money?

Mario: Just fucken...

RN: Selling dope?

Mario: No.

RN: Okay, where are you getting all the money?

Mario: Just from fucken Vida. She gives me money. Or I get money from my dad. From babysitting, that's what I get paid for. Cause I'd babysit the kids all day, for Vida.

RN: One of the things that could of helped you out is if we would of picked you up that night was we could of taken a sample of your blood to find out how much alcohol you had in you. Can't do that now, it's too late. It's all gone. That's one of the disadvantages of running. I can understand why you may want to run, but that's one of the disadvantages. Okay. To let you know. Cause Jesse said you guys had one pint.

Mario: Yea, that was with him.

RN: Cause I don't know what you had before. Who saw you drinking earlier?

Mario: Vida knew.

RN: I need to talk with her is she still at your mom's?

Mario: Uh uh.

RN: Where is she now?

Mario: At her dad's.

RN: Her dad's, in Colorado Springs? Or where does he live?

Mario: He lives off of Poplar.

RN: Do you have the address some place?

Mario: It's in my cell. But check this out, can you call her and have her meet you some where.

RN: What's the number?

Mario: It's 399-9678.

RN: About where is, what town is she staying in, Denver, Northglenn?

Mario: It's in Denver. But it's in Aurora, but it's considered Denver.

RN: Okay. We'll do that. And you mom's address?

Mario: I don't know, I just know her phone number.

RN: What's that?

Mario: It's 457-1576.

RN: Her name is Juanita?

Mario: Juanita Schmidt.

RN: That's in Northglenn, right?

Mario: That's in Northglenn.

RN: What else can you tell me about what happened? Did you see these guys with any guns? Any knives?

Mario: Well I know they have guns.

RN: Yea, but did you see any that night?

Mario: I seen someone drawing, but I don't know, cause there was, there was one shot after the two shots I fired.

RN: Everyone says they only heard two shots, Jesse, Vida, Orlando, there was even a cop in the neighborhood when it happened.

Mario: Oh, there was?

RN: Yea. There was only two shots.

Mario: Well I know they fucken...

RN: Okay, I just wanted to check in case there was something I had missed. Um, how many people got out of the car?

Mario: Well I think there were two in the front and three in the back.

RN: And how many of them got out of the car?

Mario: At least four. I know they had, I think they had clubs, or bats or something, then some 40's, some empty bottles, I think. A box full of bottles or something.

RN: Empty bottles.

Woods: Did you recognize any of them, that got out?

Mario: I'm trying to think. I think one was um that one that got, he's real young, the one that got Angel pregnant. Do you know his name? Isn't it John, John-John or some shit like that? Cause Pelon is the one that got Margo pregnant right and it's a younger brother.

Woods: Okay, um.... what kind of stuff has these guys been doing to you?

Mario: Alright, well , I don't know what date it was, but me and Jesse were uh, ya know we were just driving around, we were drinking, I won't lie, we were drinking and we were going down, what is it, what's that street you turn off, turn off of Main Street by Wincos, what street is that?

Woods: State?

Mario: State street. We were driving down State Street, going this way.

RN: Toward the airport or...

Mario: No going toward town. Okay, well I guess these fools, I don't know where they were coming, I think they were coming this way, they fucken flipped the bitch and the started chasing us, they threw a fucken, I don't know what it was, but they threw it at Jesse's car, and I was just like go dude, we don't need no trouble. So we were going and then finally they, I think I think they were

going to ram us or something, I don't know, but I told Jesse to stop, we'll just get out and run. Okay, well we did that. Okay, well they fucken, two of them came at me with bats and they started beating me, they tried beating me down, but I'm fucken luckily I'm fast enough to where I got away. And since they didn't catch Jesse either, they went straight to his car and fucked it up.

Woods: Okay, I heard about that.

Mario: And fucken I guess, uh Jesse's grandpa or grandma had called and they were like we need to report this and they were like well we have no report, there was no violence in the area, or something like that.

Woods: Well I remember that day and what happened is that there were two girls driving the car when we found them and we didn't know who owned the car. So we told the girls....

Mario: See they were driving, Jesse and I...

Woods: That's when I got a hold of them...

Mario: The girls were with us...

Woods: I told them, ya know, who owns the car and she says well I don't' know, I don't know, but these guys told us to drive the car. So then I said when you fin[illegible]he owner tell them to call us and we'll take a report, but nobody ever called.

Mario: Cause they had told me, I go what happened with your car, he's like my grandma tried calling and filing a report and they said we won't, this and that and I was like...

Woods: What kind of car were those guys driving that day?

Mario: It was a fucken big ass boat, I don't know what kid if car it was, it was a...

Woods: Convertible Chevy that got sitting in the yard there.

Mario: Convertible Chevy?

Woods: Yea, that...

Mario: No not that Impala, it's one that Texan's drive, it's a brownish kind of car, it's a big one. Well it looks like a LTD, but it's not.

Woods: Who drives the little, like a faded yellow, like a Toyota Celica? Have you ever seen that one around?

Mario: Faded yellow Toyota Celica...

Woods: Cause we have some reports of somebody from the East side they think is in a little Celica flashing guns around, at different members of the Juaritos.

Mario: Yellow Toyota Celica, a faded Toyota?

Woods: yea, it's almost like a creme color I guess.

Mario: I never seen that car before. Maybe they fucken, I don't know, I never seen that car.

Woods: Okay.

RN: I'm going to change the tape. I'm just gunna turn it over, it's 1426. We're back on, it's still 1426.

Mario: No, I've never seen that car before.

Woods: Anything else that these guys been doing to you besides the deal with Jesse's car?

Mario: Just going by my house, saying we're going to kill you, and this and that. Ya know. But like, I mean I would see them alone ya know and they wouldn't say nothing to me, they'd be like hey what's up Mario. But it's like when they get together, I don't know if it's they start drinking, or...

Woods: Well tell me about that night that you went to their house, you, was it you and Jesse that went to Margo's house?

Mario: Me, Jesse and Jamie.

Woods: And Jamie. And you guys tried to make peace with them?

Mario: Yea. Well it wasn't like we tried to make peace. like we were going by their house every night or anything like that, it was just like we went over there, ya know cause Jamie and Jesse was like you know them, you've partied with them. Ya know. I was like alright, lets go man, ya know. Cause I guess Jamie and Jesse they used to be a Juarito or whatever. Ya know. So I was like alright, fuck it, I'll go over there and I'll try to ya know, maybe get some things solved ya know. So we went over there and shit and I fucken I'm the one that went up there by myself, I was like ya know, I knocked on the door and fucken Angel fucking Matt opened the door...

Woods: Who's that?

Mario: That one Matt, I fucken don't know his name, I think his name is John or John-John or something like that.

Woods: Okay, Pelon's little brother?

Mario: Yea.

Woods: Okay.

Mario: I was like hey dude, ya know, we just fucken, I just wanted to know ya know, we don't have no trouble with you guys, ya know, why you coming by my house, saying things like that. Ya know, I have kids and shit, I don't need that bullshit. Just like you guys don't need that bullshit

either. And then right away he was like no fuck you guys man, you guys came over here fucken fucking around, I was like no dude, no we didn't even come here like that, ya know, then they were just like you can just fucken leave ya know and that is when Jamie and Jesse were just like fuck yous we will leave.

Woods: Okay.

Mario: So we left.

Woods: Was anybody else there besides that one guy?

Mario: Uh, as a matter of fact, Margo's mom was there.

Woods: Okay.

Mario: Angel and Margo's mom was there.

Woods: Did they have anything to say?

Mario: Well Jamie, I guess Jamie was talking to her. Ya know telling her fucken ya know we don't have no trouble with your sons and shit or something like that.

RN: Is there anything else you would like to tell us? We've asked a lot of questions, I think I have a pretty good idea of what was going on that night.

Mario: Now that you've got fucken...I don't know, just you know I mean

RN: Will you testify to the fact that Jesse told you to shoot?

Mario: Yea I will.

RN: Because before he was claiming that he was telling us...

Mario: I'll testify, hey man....

RN: Telling us don't shoot, don't shoot and you shot anyway.

Mario: I'll testify, straight up man, because you know I mean, I didn't fucken do this out of....

RN: Just wait for the whole truth to come out

Mario: I didn't fucken do this out of ya know anger or nothing like that, ya know, I mean I'm straight up man, I think I did this out of self-defense, whether anyone believes that or not.

RN: Self-defense, you kinda half to at least make an effort to back down.

Mario: But I mean what would you do, I mean if, you're not no gang member, people are coming by your house threatening you, ya know sooner or later they're gunna fucken do something man, they're coming up to your house, ya know...

RN: When you came out with the gun didn't they...

Mario: I didn't go out

RN: Well they saw you in the door way, cause they saw you and they saw Jesse. Coming out, you got the rifle there, did they all get back in their car again.

Mario: No, they didn't

RN: Cause, the driver was there, and at least one of the passengers was in the car when you shot, the back seat passenger was looking back at you, and you barely missed him. But he was in the car when you shot. Oh, there was another on in the middle too. We know he was there because he got cut from the plastic from the side, from when the bullet whizzing by. So we know at least three people were in the car when you shot.

Mario: How many people was with them?

RN: A total of five.

Mario: There was a total of five.

RN: Like you said, two in the front, three in the back. Just like you said. The guy in the middle in the back he got cut up because of the plastic, ya know when it went through the car, the plastic that he hit and the plastic cut his hand, his arm and his hand up. Okay. The guy in the front seat got it in the head, through and through. Makes a big hole.

Woods: How come you had your dad's gun?

Mario: Because I was scared.

RN: Everybody says your gunna sell it, not like you were scared.

Mario: No, I wasn't gunna sell it.

Woods: You just snagged it from where your dad kept it?

Mario: Yea.

RN: What were you scared of?

Mario: Fucken, of them Eastsiders man, cause I mean for being little boys they, they do got a lot of heart, I'll give them that.

Woods: What's their thing, what's their trip?

Mario: I don't know. Ya know, I don't know. I mean I was their friend at first, ya know I partied with them and this and that and I think, I think what it was that fucken, see cause I don't gang bang, ya know I try to be friends with everyone. Ya know, then before I knew them, I knew a couple buddies, but they were the older ones, like Gary and them. Ya know. And I guess I was hearing rumors that they would think that I was a Juarito. Ya know. But I'm not.

Woods: But you got to understand ya know when you hang out with them...

Mario: I hang out with everyone, I hang out with the Southsiders, I mean, they come to my house, and that's not my fault they come to my house. I'm not gonna, if they're cool with me they're my friends, ya know. I mean just like I told them why don't they come over. Ya know, but they're like well no, the Eastsiders or the Juaritios and the Southsiders over there, I was like hey that's your fault dude, that has nothing to do with our friendship. Ya know. Whatever is between you and them it's between you and them it's not between me, you and them. Ya know what I mean.

Woods: I've got Jesse and he is a Juarito too?

Mario: He said he wasn't, he said he used to be.

RN: Does he hang out with a gang?

Mario: I don't know. Some people I guess, I don't know.

RN: Do you have Pat's phone number?

Mario: No I don't have Pat's phone number.

RN: What's her last name?

Mario: I don't know, I don't really like her because she's a fucken whore.

RN: Yea, but she brought you up here. Brought Vida up here.

Mario: I still don't like the bitch.

RN: You can't remember the last name?

Mario: I'm not sure either, but Vida would know it.

RN: Anything else we can check out while were checking all this stuff out. We're kinda neutral in this whether you think so or not cause you're in custody and all that, we're kinda neutral on this, we're just out to get the truth, the whole truth and nothing but the truth, that' : only thing that interests us. We're n .re to lock you up or were not here to .ck up Jesse. Okay. That's not our job. Okay. We're just out to get the truth so the whole thing comes out, just like you were talking about. Okay. Now some of the stuff you're telling me, is different from what Jesse is telling me. Okay. I told you some of the stuff already.

Mario: See the only thing, is that fucken, ya know, Jesse's fucken I think Jesse's just trying to trying fucken to protect his ass, because he knows that ya known I have been convicted before and all this and that, ya know, and ya know he has kids too. So he don't want to do no time, ya know what I mean. But I don't care man, ya know, I mean, ya know, I do things for my reasons you know what I'm saying, and ya know, yea, I did do this and that, but I'm gunna I'm willing to fucken pay the consequences ya know, as



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long as my kids didn't get hurt, I don't give a fuck about anything else. Ya know, cause my lady is strong, she's gonna stay with me no matter what. Ya know, but I'm not gonna fucken lie to you guys and fucken come to you with some bullshit. Ya know, cause I'm not like that, ya know. Yea I did fucken leave there, the crime scene, and this and that, but at the time ya know I wasn't in the right state of mind. Ya know. I knew eventually I was gonna get caught. Ya know, if I was gonna fucken leave, I would of fucken left the fucken out of state, because you know I don't only have fucken people in this state, ya know I lived all over the country and shit. So ya know, I went to my moms ya know. Cause ya know I had to see my mom. So ya know, but I will fucken, if it comes down to it I will testify against Jesse. Ya know what I mean.

RN: Cause he said he never handled the gun.

Mario: I'll testify against him and fucken...

RN: He did handle the gun?

Mario: Well fucken the night before that I did take it to Eric's but I wasn't trying to sell it. I took it to Eric's because they wanted to see it.

RN: Who's they? Eric.

Mario: Eric, fucken there was all kinds of people over there.

RN: Tell me.

Mario: There was Eric, there was fucken Orlando, Jose...

RN: Jose who?

Mario: Not Jose Rodriguez, some other Jose, I don't know his last name.

RN: Okay.

Mario: Art

RN: Art who?

Mario: I don't know his last name either. I really don't hang with them guys.

RN: Okay, anybody else?

Mario: Uh,

RN: Did Jesse see it?

Mario: Jesse was there.

RM: Okay.

Woods: How about like Raul?

Mario: Raul wasn't there.

Woods: How about Jonathon?

Mario: Jonathon, I don't know Jonathon. I don't know him. Uh and Jamie. Jamie was there too. There was a couple of other people but I don't know there names, cause I really don't go to Eric's. Cause they been having fucken shit going down at their house all the time.

RN: And also Jesse says he told you not to shoot, is that true?

Mario: That's not true.

RN: He told you to do....

Mario: He told me to shoot.

RN: How many times did he tell you to shoot?

Mario: I know he told me at least twice.

RN: At least twice?

Mario: At least twice.

RN: And he showed you how to load the gun?

Mario: Yea.

RN: How did he show you how to load the gun?

Mario: Like put in a chamber and cock it back

RN: So he told you what to do?

Mario: Yea.

RN: Cock what back?

Mario: The fucken, the lever, isn't it the lever, that fucken, cause I know fucken, on that fucken thing, I fucken think that chamber is right here and then there's like a little lever that comes down like that...

RN: Uh huh

Mario: And you just pull it back and then what, push it up and then I guess it's loaded. And then you shoot.

RN: So he told you how to do that.

Mario: Yea, cause I....

RN: Did he load the gun for you or did he just tell you how to do it?

Mario: He told me how to do it.

RN: Okay, then you shot twice. You know what you did with that first shot or with a shot, you hit the car with one.

Mario: I didn't even know that I fucken hit the car.

RN: You just pointed it in that direction.

Mario: Yea. Then fucken I was just like fuck, I'd better fucken hurry up and get out of here cause there's gun shots.

RN: And you ran around...

Mario: Cause I didn't know, I didn't know that anyone was hit.

RN: Okay.

Mario: I just ran and cause I knew there was gun shots and then fucken.

RN: Let me see if I got all this right, then, I'm just going to summarize it. You and Jesse are sitting in the house watching TV, kicking back and you guys are drinking

Mario: Drinking

RN: some Kentucky...

Mario: Deluxe

RN: Deluxe. Okay. Watching TV, Jesse hears something, he goes and checks it out. He sees a car parked across the street. There's some people coming out?

Mario: Yea

RN: He says what?

Mario: Get up Mario

RN: What's happening, what's he tell you?

Mario: He says get up mario, there's people getting out of the car, it's them Eastsiders.

RN: So what did you do then?

Mario: I got up and I went to look.

RN: And then?

Mario: And then they fucken, I seen them starting to retaliate on us...

RN: Retaliate?

Mario: Well not retaliate, but hey had fucken bottles and bats or whatever

RN: So they're coming toward the house?

Mario: Yea

RN: And then?

Mario: And then fucken, he was like go get the gun, go get the gun

RN: He told you to go get the gun?

Mario: He told me to go get the gun. Cause that didn't even come to my mind, he was just like go get the gun, so I went and got the gun.

RN: Took you about 3 or 4 minutes to get the gun.

Mario: Yea.

RN: Cause it was under the house.

Mario: Yea.

RN: Came back, open the front door

Mario: I came back, I went to the front door, and fucken he was like load it and shoot it. I was like I don't know how, he was like shoot it, he was like here's, here's....

RN: He just said shoot it?

Mario: Yea, he was like shoot, the mother fucken gun. And then fucken I was...

RN: How loud was he.

Mario: He wasn't loud loud, he wasn't so loud so that he was fucken screaming, he was just like hurry up Mario, shoot the gun, ya know what I mean. And then fucken he was like put that fucken bullet in the fucken thing and cock it back and then pop it up and shoot it. So I was like alright. And then I just shot it and then fucken what fucken and I shot it again and then...

RN: Then you left the house

Mario: Then we left the house

RN: Which way did he go?

Mario: I don't know.

RN: But you meet up with him....

Mario: I think he was in front of me, yea he was in front of me and I was following him and we went into the alley and I threw the gun cause it, cause he had to be in front of me to see where I threw the gun, and then he was like get that gun, here, so I gave it to him and then we ran around and then we were just hiding in back of his yard and then I was then fuck this I'm not staying at Eric's cause I know they'll come to Eric's. So I just ran, I ran around...

RN: Did you still have the gun then when you left, Eric's.

Mario: He had already fucken stashed it, under a car or something.

RN: Okay.

Mario: And then I had fucken ran, and fucken, I fucken hid under this truck for a while and then after that went to my dad's. I stayed the night there.

Woods: You said, you said a minute ago that you know when Jesse see them, he tells you to go get the gun, how did he know where the gun was?

Mario: Cause, he fucken knew where the gun was.

Woods: Explain to me how.

Mario: Cause he fucken seen where I put it.

Woods: Okay. That's what I'm asking.

Mario: I mean, he sees, he's fucken trying to put it all on me, fuck him, ya know what I mean.

Woods: Sure. So he sees you put the gun down, was he with you when you put it away?

Mario: Yea. Well he used to live there before too. Ya know all them mother fuckers used to live there before I got with Vida.

Woods: Okay.

Mario: Ya know, I started kicking those mother fuckers out...

Woods: We just got to find out...

Mario: I started kicking mother fuckers out because they'd take advantage of Vida and ya know fuck that. Living off of her and shit, ya know that ain't cool.

RN: Do you have any statement forms?

Woods: I don't have any with me.

RN: Would you like to have to opportunity to write all this out in you own words? Or do you just want to trust the tape recorder?

Mario: I don't know, shit man.

RN: That way it doesn't get passed out with what I say, that's why I use a tape recorder, so I get everything straight.

Mario: Yea.

RN: But when you write it down in your own words, that also gives you the opportunity to say it the way you want it to be read by the people that need to know, my boss, the District Attorney, the Court, that kind of stuff, okay.

Mario: I mean, I mean, can I ask you this?

RN: You bet.

Mario: I mean, how's this looking for me?

RN: Well, I'll need to talk to Jesse again obviously, cause he's lying, um, I think you're in trouble, I mean I don't think, like you said, self-defense and all that, me personally, I think some people may listen to that, but again the law is pretty specific, you have to back down. Okay. If they would of been coming into your house, and your back up against the north wall, then you shot, then not a problem. You wouldn't be here. You would not be here. But the guy that was killed was sitting in his car across the street. Not a lot of self-defense there, he wasn't the danger to you. Okay. Joe was, I think you proved your point when you had the rifle in hand, these people were a shitin' and a gettin', they wanted out of there.

Okay. They had bottles and whatever else they had, cans of beer and who knows what all, clubs you say or bats, that's no match for a 270, they knew it. And um, I don't know what you're thinking in you head what you believe you saw, but um, I haven't read everybody's reports, but it's my recollection that everybody was in the car by the time you shot, I know at least three people were in that car when you shot.

Mario: But that's what they say.

RN: I can prove three of them were in the car. I can prove three were in the car, when you shot, okay. No doubt about it. Okay. Then there's five against you. You know if they were all in the car. But at least three were. I mean one was killed in the car, in the driver's seat, the guy in the middle was hit with some plastic and it cuts his arm in two spots. The plastic, I don't know if you remember the inside of the car there is some plastic on the side of it, okay, anyway well the bullet goes through there it fragments and all the plastic is going at about a thousand feet per second, and it hit this other kid, okay, that was in the back seat, in the middle. It hits him and a third one was looking back at you guys and he thought it was Jesse that pulled the trigger when he first told me about it. Okay. Cause you guys were right together on the porch. And he was plenty scared, cause ya know if he

ıld of been sitting back like this, instead of looking like this out he window, you would of got him, instead the driver. Okay, cause the bullet went right through the car and stopped at the front door post. Okay. That's what happened. Okay. So looking for you, I know, I personally, it's me, I don't know what the courts gonna say, I don't know what the DA is going to say, he's gonna hear everything you've told me. Okay. You'll have an opportunity to listen to this tape or a transcript of it if he likes. I don't know whether or not he's gonna buy self-defense. But I think he'll understand your position.

Mario: I still won't be, I mean, I mean, look I already fucken, see I don't even understand this man, cause...

RN: Okay, what don't you understand?

Mario: People telling me that I shouldn't fucken talk to you guys.

RN: Well I think by talking to us...

Mario: That I should talk to a lawyer first...

RN: Well you made the choice.

Mario: I mean that I don't, ya know...

RN: Right now, when we walked in here, we were looking at 1st Degree Murder, okay, now I'm not so sure I'm looking at 1st

Degree Murder. I was looking at charging just you with 1st Degree Murder, but now I'm thinking Jesse's got a lot more involvement than Jesse's been telling me. Okay. I'm thinking maybe second or something else. Okay. But that's the DA.

Mario: Ya know what I think man, I thinking...

RN: You think I should just let you out of here today? Don't you?

Mario: No, I ain't saying that, I ain't saying all that, I'm just saying that I think first of all if Jesse, if Jesse would of never been around, none of this bullshit would of ever happened.

RN: You're probably right.

Mario: Ya know what I mean?

RN: You're probably right.

Mario: Because Vida would always tell me why do you let that mother fucker come around here. Ya know. Ya know that fucken, them mother fuckers hate him, ya know, and that's just partly my fault for being kind hearted and fucken...

RN: Do you want to go back, if you hadn't been drinking, this may not of happened, if Jesse had not been there, this may not of happened, but if you hadn't taken your dad's rifle, and he says it's without your,

without his permission, you wouldn't be here. Okay. That's just the start of it. If you'd taken care of that warrant that you had with Lakewood, you wouldn't be here. We could go back, back, back, back, back, we could go back and a lot of what if's, if this didn't happen, if this didn't happen, if any one of those things didn't happen...

Mario: But it did

RN: But they all happened. So you're here. Okay. If the Cervantez' hadn't driven by your house when they drove by your house, if they hadn't been yelling and doing everything else, this wouldn't of happened, ya know, if Jesse wouldn't of told you to shoot, shoot, shoot, you wouldn't be here, if Jesse hadn't showed you how to load the gun, you wouldn't be here. There's a lot of things that happened, that's why you're here and none of them can go away because there is a man that's dead. You killed him instantly. He didn't have a chance. If you would of shot him in the hospital he wouldn't of had a chance. Okay. His whole brain just ruptured inside of his skull. Okay. That's why you're here. But it's our job to get through everything, you want an opportunity to write out what you've told us, here's some paper, here's a pen. This is your chance to address everybody, this is what happened, this is my side of the story, this is how I want everybody to know my side of the story.

Not from the tape, through questioning and everything else, right now.

Mario: Could I write it down and you guys come back?

RN: Okay, we've got time.

Mario: Cause uh, you want me to write everything that happened that night? Or things that happened before that too? Or...

RN: Anything that you think is important.

Mario: Because it's gunna fucken be about 4 or 5 pages.

RN: We've got all day. We can go off tape for awhile.

Mario: I got to write this shit down. And who is this gunna go to?

RN: This is going to go into the case file. Everybody will have an opportunity to see it. The District Attorney, who makes the decisions on what to charge you with, or not to charge you with, he will read that, guaranteed.

Mario: And when will I be going to court on this shit? Or when will I be getting extradited?

RN: Well you're not going to be extradited because your in the state of Colorado,

transported back, um, they were talking maybe today.

Woods: Yea, maybe today.

Mario: Maybe today, later on or?

RN: Yea.

Mario: You guys would transport me?

RN: No.

Mario: Someone else?

RN: Somebody else, Sheriff's Office.

Mario: Sheriff's office

RN: Deputy Dominguez was up here today and I'm not sure if he was going to stick around and transport you today or if they'll send somebody some time later to transport you.

Mario: Cause I know I have...

RN: A thing up in Denver..I see they got right to you before we do I think.

Mario: Cause I know that's fucken DOC.

RN: Okay, they may have some sort of hearing before we get you at all, I don't know all the details. All I know is um, I was sent to talk to you today. Okay.

Woods: Like I said earlier man, we're just trying to find out what happened. Let me ask you one question before you start writing, okay, something that's been kinda bugging me, um, when we went into the house there was one of those things that sits on the scope, you know what I am saying, like a cover, would it be from the gun, there would be a scope cover, know what I mean, it's like a thing so you can look through it, you take it off so you can look through it, like it protects it from dust, and it was probably on the gun...

Mario: what...was it made out of rubber or what?

Woods: It was like a rubber thing in between, just they call it a scope cover,

RN: Oh, it's got, you know how its got, has the two ends to it, its got a plastic part here and a plastic one that covers the other end and you just take it off real quick.

Mario: What is it for?

RN: Just so the lenses don't get dirty.

Mario: I, I don't know, maybe, I don't know, maybe, it came off when I took it out of the...

RN: Case

Mario: Case thing

Woods: Alright

Mario: I don't know

Woods: okay, I was just I was just curious, cause I, it was there and I just wondered why.

Mario: Oh.

RN: Okay, do you want to go off the tape then?

Mario: Yea.

RN: Okay, we'll turn off the tape at 1452.

RN: Okay, we're back on the tape, it's 1535 hours, Mr. Romero has just finished a written statement, which I have yet to read. Sign the last page and sign the other pages

Mario: Do you want me to sign the other pages?

RN: Yea

Mario: Do you want me to date them

RN: Yea, so they know I didn't forge your handwriting, like I could write that well.

While you were writing your statement, I'll review it here in a minute, um, a couple of question came to mind for me, uh, first off the clothes and shoes that you

were wearing at the time of the shooting, where are those located?

Mario: They're at my dad's house.

RN: At you dad's, where at?

Mario: They're in my brother's room

RN: What were you wearing that night? Which brother's room first?

Mario: My brother Gabe.

RN: Okay. What were you wearing that night?

Mario: Some white jeans

RN: Okay

Mario: And a white t-shirt

RN: And anything else? What kind of shoes?

Mario: Some, what was I wearing that night, my black Nikes

RN: Are they still there?

Mario: Yea

RN: Were you wearing a dark colored shirt at all?

Mario: Uh Uh, I think Jesse was wearing a dark....

RN: Okay, can we pick those up?

Mario: I don't mind, go ahead

RN: Okay, uh...

Mario: Do you need me to sign for that?

RN: I think, I don't know if I brought that particular form with me, I brought a ton of forms, I don' think I brought that particular one so, I'll just ask your dad and...

Mario: Okay.

RN: Uh, I may need to get a warrant for something to search for that, but that's no big deal. Um, where did you get the booze and when did you get it?

Mario: I got if from... Terry's, cause they sell them for $3 bucks a pint. Uh, I'm old enough to buy, but I don't have no ID, so I'd usually have someone else buy for me.

RN: Okay, when did you get it?

Mario: Um, I'd say around fucken 4:00

RN: Thursday?

Mario: 3:00, yea, I don't know, I usually wake up drinking though.

RN: That's not a good way to live your life.

Mario: I know

RN: Who bought it for you?

Mario: John

RN: John who?

Mario: I'm not sure of his last name, but Jesse knows who he is. He knows his last name. I think it's his cousin, but I'm not sure.

RN: Do you know where John lives or his phone number?

Mario: I don't even know, I, I met him, but I really don't know him.

RN: And how many do you buy at that time?

Mario: He bought like, he bought me, like three or four, that I had drank and then I, Jesse had came over and I drank one with him.

RN: Okay, so how many did you drink that day?

Mario: Like five, but I drank like Mad Dog and Budweiser

RN: Did you split, did you split one with Jesse then you had three or four of your own?

Mario: Yea

RN: Did you drink anything else?

Mario: Some beer

RN: What kind?

Mario: Budweiser

RN: How long you'd been drinking it? All day?

Mario: Yea, and the day before that and the day before that...

RN: Are you an alcoholic?

Mario: Yea

RN: How much do you weigh?

Mario: I weigh around 140

RN: Okay, were you eating that day?

Mario: Yea

RN: What did you have?

Mario: Um, probably some chimichangas, and chips

RN: That's it?

Mario: Yea...

RN: See I eat a lot...

Mario: but I snack all day, ya know, most people that drink all the time they don't eat, but...

RN: You snack all day?

Mario: but I think I'm immune to it or something?

RN: What to booze?

Mario: Yea, cause I mean...

RN: That kind of feeling, will get you killed. But, whatever, I'm not here to tell you how to live your life. Where you taking any other drugs that day?

Mario: No

RN: You say your immune to booze?

Mario: I,I,I don't know, because like I mean, what I notice is that when people drink with me, like they'll get, they'll get, I mean, most people it only takes them like two beers to get a buzz, and it takes me like about a 12 pack to get ya know, I mean, I do...

RN: You're a little guy

Mario: Actually, I'm serious man, you could ask Vida this, I'd fucken, I drink all day, once I start drinking, I, it's like I can't stop. Ya know.

RN: You could drink a 12 pack before you get a buzz?

Mario: I won't even get, no I won't even have a buzz. I'll have to have...

RN: With a 12 pack?

Mario: I ain't lying, I swear to God. And usually I have to drink something else.

RN: I'm half a body bigger than you...

Mario: Like I'd have to drink Mad Dog

RN: Really?

Mario: Like that day that they did that to um, Jesse's car, we drank, cause they right now sell like fifths of fucken Mad Dog, alright we drank like maybe eight bottles of Mad Dog plus two fifths of Mad Dog and then like another couple maybe, maybe a couple pints of Canadian or ya know that fucken, cause that shits all cheap, it's only like what, Mad Dog's like $2.50, ya know and then ya know, so all that shit that we get is cheap, but it's fucken, it'll fuck you up.

RN: I'd be sicker than a dog on a lot less than that. Uh, when you shot the rifle, left hand or right hand?

Mario: I'm right handed not left handed

RN: So which one did you use?

Mario: I used my right hand

RN: So you pulled it with your right finger?

Mario: Yea

RN: Okay, we found a shell casing, in the alley way, okay, the shell casing you shoot, you shoot a cartridge ya know it's got a bullet in it and the case and the powder and all that stuff, okay, when you eject it, it goes somewhere, that the shell casing, the brass part...

Mario: Uh huh

RN: Okay, we found one in the alley. But you said you fired both shots from the front door, right?

Mario: Yea

RN: How come we didn't find any around the front door and we found one in the alley? And one was left in the gun.

Mario: I don't know, maybe fucken...

RN: What I'm telling you is I don't see how in the world you could of possibly shot both shots from the front door.

Mario: I don't know, but I know fucken when, when Jesse was running with the gun, after I handed it to him, it went off, that's why I said remember earlier I said that I thought I heard three shots.

RN: Okay

Mario: Maybe that's when it fucken, cause it went off...

RN: You're saying Jesse fired the third shot?

Mario: I, I don't know because I know it went off when he was stashing it, when he was stashing it, it went off. And it fucken, cause like if you go in the back of Eric's yard, alright, you go in the back of his yard, remember, how in the fucken garage he has, cause I know Jesse went around like that, he was putting the gun down, I think, and then fucken all I know is I heard a shot and there's like some tin, remember it's fucken tin back there, it's a tin garage. But I don't know, I don't know about that other that casing.

RN: So he fired it once? Or Accidentally...

Mario: Yea, I think so.

RN: So how did the one casing get...

Mario: In the alley? Maybe it fell out when we were running.

RN: So there should be another shell casing up around the front of the house then.

Mario: Probably. Or maybe I don't know, maybe there was just two shots. See but I don't know, I don't remember, I was, I was fucked up.

RN: You just told me you were immune to alcohol, now you're taking it all back.

Mario: No, but to, when the point, when the point comes, hey..

RN: Like a freight train huh?

Mario: When I'm drinking by myself, ya know, it's fucken, usually I don't like drinking by myself, but, when there ain't no one around and shit, I'll drink, ya know.

RN: Could you use a drink now?

Mario: No, but it don't bother me like, but like I was having the shakes for a minute.

RN: Did Jesse ever tell those guys that were in the car, you're fucked up now pussies?

Mario: I don't know

RN: Did he ever say anything like that?

Mario: Not that I know of. I know fucken one night he came to my house and he was like I went by those mother fuckers houses. I guess fucken he had went by there and fuck by himself, I guess he was getting all fucked up one night, ya know he went by their house or something like that, but ya know

RN: One of the things that Jesse told me to, I think it was yesterday, let me check my notes, just a second, let me see if I have

them here. Were you wearing a hat that night?

Mario: No

RN: Sometime ago, you were gunna get, you got the rifle, what day did you get the rifle?

Mario: It was on Wednesday

RN: The day before the shooting?

Mario: No actually it was, the shooting was on Thursday, yea it was on Wednesday, Wednesday afternoon.

RN: Okay. Sometime before then, maybe it was after, I'm not sure exactly when, you told Jesse that you were gunna use it, that you wanted to blast somebody.

Mario: No, I never told him that. I never told him that.

RN: You sure?

Mario: I,I,I'm serious, I'm very serious

RN: Okay, why would he tell me that stuff?

Mario: I don't know, but I know I told him that I was getting it for my protection. I didn't say I was gunna shoot anyone though.

RN: How can you use a gun for protection if you don't shoot anybody?

Mario: Yea, but, them words are different.

RN: Now you're telling me that Jesse is the one, he might have shot that last shot in the alley way?

Mario: Yea I think he did

RN: When he ditched the rifle?

Mario: Yea

RN: You're sure he ditched the rifle not you?

Mario: I'm positive.

RN: Big difference from what he's telling me, I just want you to know that. I just want you to be absolutely sure about that.

Mario: I'm positive.

RN: Let's look at your statement here. Is it very important to you that people don't believe that you're not a gang member, isn't it?

Mario: I'm not.

RN: That is important?

Mario: That is important, because...

RN: Why?

Mario: Because man, ya know, I don't, I don't like dealing with all that gang bullshit. Ya know what I mean? I just, It's a bad thing I think, ya know, you can't get a job if people think you're a gang member. Ya know.

RN: You have a tattoo on your neck.

Mario: I know, but still, ya know, when I got to a job interview, I fucken, I wear, I'll wear a long sleeve shirt, ya know, they maybe able to see this, but most people don't notice this, alright, but like, ya know, I'll go to a job interview and I'll ya know, I mean, I'll go in there, I'm polite ya know, I have my manners, ya know, I am a smart person, ya know, I'm intelligent,

RN: Uh huh

Mario: Ya know, ya know, I don't go in there talking like hey fuck you, ya know, shit ya, I need this job for ya know, I don't go in there like that, like a lot of, like a lot of people that I do know, ya know, they just, they don't know how to hold their composure and shit ya know. But ya know, I'm not a gang member and that's what I'd like everyone to know, ya know.

RN: It just seemed important. You cold?

Mario: Shit, cold down there too.

RN: You're not a gang member, how in the world did you get all tied up with all this stuff?

Mario: Probably when Jesse started coming around. That's straight up the truth.

RN: How long have you been in Alamosa?

Mario: I've been in Alamosa for, well me and Vida been together for seven months, so ya know, I've probably been in Alamosa for like maybe 9-10 months.

RN: Stayed out of trouble while you were there?

Mario: Yea. You could verify that...

Woods: You were there way before though, weren't you?

Mario: No, see I...

RN: You just got out of the Pen...

Mario: I got just out, while see I came, I chose my number in South Dakota, and I had got a case, that burglary case, that's what the probation violation is, well I went to Santa Core, see and that place was a joke, man, everyone was doing drugs there. Ya know, so I was like fuck this, I was going to leave, so I left and that's when I went to Alamosa, ya know, I told my dad, I told my dad, hey dad, ya know, ya know, I need to get a job, ya know I

didn't come out here to fuck around ya know, I don't want to get in trouble or nothing like that, he goes alright ya know, he goes I don't approve of this, but I'll help you get a job, cause that's when he was working at the ya know, my dad he's, he's a good person and ya know he helped me get a job so I got a job. And as a matter of fact I was gunna start going to school, but the budget was low, ya know I was gunna start going to the vocational school. And ya know, I was minding my, I mind my own business ya know, I was living at my dad's and then ya know I had met Vida ya now, and then we finally got something going and I moved in over there and she started going to school so I would babysit for her in the day time and I would go work at night time, ya know, and Jesse didn't come around until like about what a month ago, cause he was living in uh, Avon, ya know. He came out there, and then, this all hell started breaking loose, ya know, and I never knew, I never kicked with him that last time, when I was in Alamosa in '92, ya know, I knew him and Jamie cause that's who used to hang together was him and Jamie. Ya know, and I and I was like the same way I was before, I would just hang by myself, ya know, cause I know when you get with that gang that gang shit, ya know you'll get caught up in some bullshit. And that, ya know I mean, that's what I think all this shit started happening.



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RN: When was the last time you worked?

Mario: Uh, I'd say about four months ago. No actually about five months ago, and I was working at Aspen Homes and it was a temporary job, I worked there for like what maybe two months, month and a half and then job was over because they didn't have no more work for me to do and that was during the winter time and then I would go to uh the job service ya know, but it was kinda hard for me to find a job because I didn't have no id., so ya know

RN: Didn't really want to flash your prison id?

Mario: Not only that but like you can't get a, if you have a felony ya know a felony warrant, you can't get a Colorado ID.

RN: Yea.

Mario: Yea, so.. Ya know my options were limited, so I figured well hell I'll just stay home and watch the kids for Vida and she'll pay me for that. So that's what I started doing. Ya know, I mean ya know I was trying to help her out, so that way she could go to school because as it was, ya know, she was fucken, ya know, she would of had to been paying a lot of money for a babysitter, so she would of been hardly getting by because she had to pay rent to and this and that, I was like hell I'll just ya know try to help you save some money so that way you'll have more

money for the kids, ya know, and I'll just watch the kids at for you at when you got to school. And ya know..

RN: And now she's gunna have a baby by you.

Mario: Yea

RN: So what are you long range plans for all that.

Mario: Well, um, I don't know. I,I, I mean, ya know, were gunna stick through this together, no matter what happens, but ya know, I never meant for her to get involved with this bullshit ya know, I just wished ya know the kids, ya know, that's bullshit, ya know what I mean.

RN: Yea, the whole house over there is BS, everything that's been going on over there. Is there anything else you want to tell us?

Mario: Um..

RN: Believe it or not, I think I'm out of questions. You never thought I'd shut up.

Mario: I'm glad you fucken..I tried to answer all your questions...

RN: Okay, well I appreciate your time..

Mario: If there's any questions that come up, ya know, I'll answer them for you, ya know, I'll try my best.

RN: There may be a few when you get down to Alamosa or whatever maybe I got a couple of little things, um, mostly probably pertaining to Jesse and that kind of stuff. Okay.

Mario: Alright.

RN: Anything else you want to say...

Mario: Are you gunna talk to my dad?

RN: I talked to him yesterday.

Mario: Did you?

RN: Yea, I told you that earlier...

Mario: Oh shit yea you did, you said he was upset

RN: Upset ain't the word, the man's crushed. Can't even begin to tell you, I've not seem somebody that hurt...

Mario: I think I'll call him

RN: I think he'd like that

Mario: What time is it?

RN: It's about 4:00.

Mario: I think he'll be getting off work, I think I'll call him, since I chicken out last night...

RN: He's hurting, I think it would be good for you to talk to him, he was real concerned that maybe, while he wanted you to do the right thing and turn yourself in, uh, he was real concerned that I think that maybe you might do something real stupid up here, you know,

Mario: Like suicide or some bullshit like that..

RN: No like maybe if the cops came and knocked on the door that you might get desperate and you might do something stupid with the cops.

Mario: Oh no, fuck that...

RN: So, I think he was real concerned about those kinds of things. Okay.

Mario: Alright, well are you gunna call Vida today or?

RN: Yea, I'll call her and see if we can't meet before we leave town.

Mario: Okay, well just tell her that I miss her, if you can

RN: Want to write her a note?

Mario: Yea, could I?

RN: Sure. Write fast.

Mario: I will.

RN: I know Shawn has to go to the bathroom, he's fidgeting over here.

Mario: I know and I'm dying of thirst.

RN: I know, where are the stupid water fountains. Then you can fold it up anyway you want, we won't peek. If I don't deliver it to her, I'll just drop it off at your dad's. Okay.

Mario: Okay. Were you going to see my mom too?

RN: Yea

Mario: Just drop it off at my mom's.

RN: How far away is Vida's dad from you mom's?

Mario: It's about a good half and hour drive, and it's about a good half and hour drive from here to my mom's.

RN: Which is closer...

Mario: My mom's.

RN: Okay, well call Vida from here and have her meet us at your mom's, does she have a car?

Mario: No, but my mom will give it to her.

RN: Okay, well if there's nothing else, then I'll go ahead and close the tape. It's 1558 hours. Oh, one other thing, I guess I should ask, you can go finish your note if you want

Mario: Go ahead

RN: I just wanted to make sure, did we make any promises to you?

Mario: No

RN: Coerce any statements from you?

Mario: No

RN: Threaten you?

Mario: No

RN: Beat you?

Mario: No

RN: Okay. Everything you said was free and voluntary?

Mario: Yes.

RN: Okay. Completes the interview at 1558 hours.

Supreme Court, U.S.
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No. 97-1688

**In The**

**SUPREME COURT OF THE UNITED STATES**

**October Term, 1997**

---

**THE STATE OF COLORADO,**
*Petitioner,*

vs.

**MARIO ROMERO,**
*Respondent.*

---

On Petition for Writ of Certiorari to
The Supreme Court of the State of Colorado

---

# BRIEF OF AMICI CURIAE STATES OF UTAH, ALABAMA, ALASKA, DELAWARE, IDAHO, KANSAS, MISSISSIPPI, MONTANA, NEBRASKA, NEVADA, NORTH CAROLINA, OKLAHOMA, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, AND VIRGIN ISLANDS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether the respondent's mid-statement remark that, "Yea. Cause I, ya know, I'm not gunna lie man, ya know, I mean I should wait, and I should talk to a lawyer and this and that because I do want to go to trial on this," constituted a "clear," "unambiguous," and "unequivocal" request for counsel within in the meaning of *Davis v. United States*, 512 U.S. 452 (1994).

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No. 97-1688

**In The**

**SUPREME COURT OF THE UNITED STATES**

**October Term, 1997**

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**THE STATE OF COLORADO,**

*Petitioner,*

vs.

**MARIO ROMERO,**

*Respondent.*

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## INTRODUCTION

In *Davis v. United States*, this Court clarified that custodial interrogation may continue unless or until a suspect unambiguously invokes the right to counsel. 512 U.S. 452, 459, 462 (1994). In drawing this bright line, the Court emphatically stated its "unwilling[ness] to create a third layer of prophylaxis to prevent police questioning when the suspect *might* want a lawyer." *Davis*, 512 U.S. at 462 (emphasis added). The majority of lower courts have followed *Davis* without hesitation. A divided Colorado Supreme Court in *People v. Romero*, ___ P.2d ___ (Colo. 1998) (Pet. App. A), joins a small but troubling minority of courts unwilling to apply *Davis*'s bright line rule.

*Romero* involved the following mid-statement remark: "Yea. Cause I, ya know, I'm not gunna lie man, ya know, I mean I should wait, and I should talk to a lawyer and this and that because I do want to go to trial on this" (Pet. App. at A-5). The *Romero* majority held that this statement constituted an unequivocal request for counsel within the meaning of *Davis* (Pet. App. at A-15, A-19, A-24-A-25). Because this remark is on its face "the quintessential equivocal statement" (Pet. App.

at A-36) (Mullarkey, J., dissenting), the *Romero* majority unjustifiably erects the "third layer of prophylaxis" *Davis* expressly disavowed. *Davis*, 512 U.S. at 462.

## STATEMENT OF AMICUS INTEREST

Amicus State of Utah and 14 other amici States write to urge the Court to summarily reverse the *Romero* majority because it erodes *Davis*'s bright line rule. The amici States consist primarily of those where *Davis* has been misapplied, disregarded, or not yet interpreted. Approximately 16 lower courts have yet to confront the *Davis* issue.[1] The amici States

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[1] Thirteen states (Alaska, Idaho, Kentucky, Mississippi, Montana, Nebraska, Nevada, New Mexico, North Dakota, Pennsylvania, South Dakota, Utah, and Washington) and two Federal Courts of Appeals (First and Tenth Circuit Courts of Appeals) have yet to confront *Davis*'s bright line rule in either a request for counsel or a right to silence case.

While Maine, New York, Rhode Island and Vermont, and the Eighth Circuit Court of Appeals have not addressed *Davis* in a request for counsel case, they have faithfully applied its bright line rule in right to silence cases. *State v. King*, ___ A.2d ___, 1998 WL 159808 at 1, 3 (Me. January 5, 1998); *People v. Cohen*, 640 N.Y.S.2d 921, 923 (N.Y. App. Div. 1996), *rev'd on other grounds*, 687 N.E.2d 1313 (N.Y. 1997); *State v. Bailey*, 677 So.2d 407, 409 (R.I. 1996); *State v. Bacon*, 658 A.2d 54, 65 (Vt. 1995), *cert. denied*, *Bacon v. Vermont*, 516 U.S. 837 (1995); *United States v. Johnson*, 56 F.3d 947, 955 (8th Cir. 1995). Delaware has also not addressed the *Davis* rule in a request for counsel case, but has expressly declined to extend its bright line rule in a

believe that summary reversal will honor *Davis*'s bright line rule and check further spread of the unwarranted "third layer of prophylaxis." 512 U.S. at 462.

## REASONS FOR GRANTING THE PETITION

The petition should be granted because the *Romero* majority reinforces a minority of lower courts threatening to eviscerate *Davis*'s bright line rule. It is on this ground that the Amici States support Colorado's petition urging the Court to summarily reverse the *Romero* majority. The Amici States differ from Colorado's petition only insofar as Colorado suggests that this case also presents an opportunity for the Court to further elucidate *Davis*'s bright line rule. The amici States find that *Davis* is properly applied in most lower courts and, therefore, its pellucid teaching need not be revisited.

### I. THE COURT SHOULD GRANT THE PETITION BECAUSE THE *ROMERO* MAJORITY REINFORCES A TROUBLING MINORITY OF LOWER COURTS THREATENING TO ERODE *DAVIS*'S BRIGHT LINE RULE

The *Romero* majority does not stand alone in straying from *Davis*'s clear teaching. The most recent court to do so is the Supreme Court of North Carolina, which held that another quintessentially equivocal remark, "I think I need a lawyer present," was an unequivocal assertion of the right to counsel. *State v. Jackson*, ___ S.E.2d ___, 1998 WL 151145 (N.C. Apr. 3, 1998). *See also State v. Bohn*, 950 S.W.2d 277, 280-82 (Mo.

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right to silence case. *DeJesus v. State*, 655 A.2d 1180, 1195 n.6 (Del. 1995).

App. 1997) (holding that suspect's remark, "I feel like I ought to have a good counselor. I have in the past," was sufficiently clear to invoke the right to counsel). *But see State v. Parker*, 886 S.W.2d 908, 918 (Mo. 1994) (suspect's supposition that he "ought to talk to an attorney," did not unambiguously invoke the right to counsel under *Davis*), *cert. denied, Parker v. Missouri*, 514 U.S. 1098 (1995).[2]

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[2] In addition to the North Carolina Supreme Court and the Missouri Court of Appeals, panels of the Fourth, Ninth and Eleventh Circuit Courts of Appeals have similarly misapplied or disregarded *Davis* and found equivocal language sufficient to invoke the right to counsel. *See Correll v. Thompson*, 63 F.3d 1279, 1286 (4th Cir. 1995) (suspect's remark "that he thought he wanted an attorney"), *cert. denied, Correll v. Jabe*, 516 U.S. 1035 (1996); *United States v. Cheely*, 36 F.3d 1439, 1448 (9th Cir. 1994) ("my attorney does not want me to talk to you"); *Krysinski v. Rowland*, 89 F.3d 845 (table), No. 94-16749, 1996 WL 218172 (9th Cir. Apr. 29, 1996) ("Do I get to talk to a lawyer, or something?"). *See also Craig v. Singletary*, 127 F.3d 1030, 1039-1040 (11th Cir.) (assuming without deciding that suspect's remark upon being informed of the evidence against him, "well if you got that against me, you might as well get me a lawyer," was an unequivocal request for counsel), *cert. denied*, ___ U.S. ___, 118 S.Ct. 1323 (1998). *But cf. Coleman v. Singletary*, 30 F.3d 1420, 1423-1424 (11th Cir. 1994) (suspect's response to question whether he wanted a public defender, "I don't know. But if he said to stop it I don't want to do what he said not to do," held insufficiently clear to invoke his right to silence); *Medina v. Singletary*, 59 F.3d 1095, 1104-05 (11th Cir. 1995) (suspect's "No" response held inadequate to invoke right to silence, where response was given when suspect was asked if he wanted to talk after

In arguing that the *Romero* majority clearly conflicts with *Davis*, the amici States recognize that state courts are free to provide more protection for equivocal invocations. A few state courts, dissatisfied with *Davis*'s bright line drawing have chosen to afford more protection under state law for suspects using equivocal language.[3] The *Romero* majority, however, is

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tape recorder was turned on, and where suspect had been clearly willing to talk before recorder was turned on, and had said, "Yes," when asked if it was okay to turn on the recorder), *cert. denied*, ___ U.S. ___, 116 S.Ct. 2505 (1996).

The Ninth Circuit has also misapplied *Davis* in a right to silence case. *See United States v. Soliz*, 129 F.3d 499, 504 (9th Cir. 1997) (suspect's response upon being asked if he were willing to make a statement, "Yes, regarding my . . . citizenship," held to be an unequivocal invocation of right to silence on all but citizenship issue); *but see Evans v. Demosthenes*, 98 F.3d 1174, 1176 (9th Cir. 1996) (suspect's conduct in writhing in pain and complaining of stomach pain held insufficient to invoke his right to silence), *cert. denied*, ___ U.S. ___, 117 S.Ct. 2489 (1997).

[3] *See State v. Hoey*, 881 P.2d 504, 523 (Haw. 1994) (recognizing suspect's reference to an attorney, "I don't have the money to buy one," was ambiguous, but holding under *state* law that all but clarifying questioning must cease once a suspect makes even an equivocal reference to the right to counsel); *State v. Grant-Chase*, 665 A.2d 380, 382 (N.H.) (holding under *state* law that defendant's request to call an attorney was ambiguous as to purpose and police properly clarified and obtained a *Miranda* waiver before questioning proceeded), *cert. denied, Grant-Chase v. New Hampshire*, 517 U.S. 1140 (1996); *State v. Chew*, 695 A.2d 1301, 1317

not an instance of a state court interpreting its constitution more expansively than the federal constitution. Rather, the *Romero* majority misconstrues equivocal language as an unequivocal invocation of the right to counsel, forcing law enforcement to make the very "difficult judgment calls" *Davis* expressly sought to avoid, "with the threat of suppression if they guess wrong." *Davis*, 512 U.S. at 461. As a consequence, the *Romero* majority flouts *Davis*'s bright line rule and hamstrings legitimate law enforcement efforts.

The *Romero* majority is clearly aberrant. Most lower courts that have confronted the issue followed *Davis*. Faced with similar language, these courts found such language equivocal and insufficient to require a cessation in questioning under *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981).[4]

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(N.J. 1997) (recognizing that suspect's request that his mother contact his attorney was an equivocal invocation of the right to counsel that had to be clarified under *state* law); *State v. Potter*, 478 S.E.2d 742, 751 & n.18 (W. Va. 1996) (suspect's "okay" response, upon being advised that if he could not afford an attorney one would be provided for him, was insufficient to invoke right to counsel and further interrogation did not offend *state* law; however, because suspect unequivocally waived right to counsel, court declined to address further instances in which clarifying questions would be appropriate under state law).

[4] *E.g.*, *Brown v. State*, 668 So.2d 102, 103 (Ala. Cr. App. 1995) ("Is it going to piss y'all off if I ask for my–to talk to a friend that is an attorney?"); *State v. Spears*, 908 P.2d 1062, 1071 (Ariz.) ("It's just her word against mine then. You want to arrest me for stealing a car, then let me call a lawyer and I'll have a lawyer appointed to me and, because this is

going no where [sic]"), *cert. denied, Spears v. Arizona*, ___ U.S. ___, 117 S.Ct. 393 (1996); *State v. Eastlack*, 883 P.2d 999, 1007 (Ariz. 1994) ("I think I better talk to a lawyer first"), *cert. denied, Eastlack v. Arizona*, 514 U.S. 1118 (1995); *Higgins v. State*, 879 S.W.2d 424, 428 (Ark. 1994) ("Do you think I need an attorney?"); *People v. Crittenden*, 885 P.2d 887, 912-13 (Cal. 1994) ("Did you say I could have a lawyer?"), *cert. denied, Crittenden v. California*, 516 U.S. 849 (1995); *State v. Anonymous*, 694 A.2d 766, 772 (Conn. 1997) ("Do I still have the right to an attorney?"); *Gresham v. United States*, 654 A.2d 871, 874-75 (D.C. App.) (defendant's request to his girlfriend, "to call his mother and tell her to get him a lawyer"), *cert. denied*, 516 U.S. 854 (1995); *Henry v. State*, 462 S.E.2d 737, 743 (Ga. 1995) (defendant's response to question whether he wanted a lawyer, "I might need one. If I need one"); *Luallen v. State*, 465 S.E.2d 672, 675 n.5, 676 (Ga. 1996) (defendant's comment that she would "talk to [her] lawyer tomorrow"); *Jordan v. State*, 480 S.E.2d 18, 20-21 nn.3-4 (Ga. 1997) ("might need a lawyer"); *Tucker v. State*, 491 S.E.2d 420, 421 (Ga. App. 1997) ("I guess I need a lawyer because I wasn't even there when that happened"), *cert. denied*, ___ S.E.2d ___ (Ga. Jan. 23, 1998); *State v. Oaks*, 662 N.E.2d 1328, 1347 (Ill. 1996) ("Should I see a lawyer?"); *State v. Jolley*, 684 N.E.2d 491, 492 (Ind. 1997) ("If we was going to do this I'd want a lawyer"); *State v. Morgan*, 559 N.W.2d 603, 607 (Iowa 1997) ("might need a lawyer"); *State v. Bailey*, 889 P.2d 738, 745-46 (Kan. 1994) (defendant's question, "if he should ask for an attorney at that time"); *State v. Ninci*, 936 P.2d 1364, 1380-81 (Kan. 1997) ("[D]o I need to have a lawyer right now?"); *State v. Wesley*, 691 So.2d 772, 774 (La. App. 1997) ("Can I get me a lawyer before I talk? Like the man said on that thing right there?");

*State v. Nixon*, 687 So.2d 114, 116 (La. App. 1997) ("Can I get my lawyer?"); *Matthews v. State*, 666 A.2d 912, 917-18 (Md. App.) ("Where's my lawyer?"), *cert. denied*, 672 A.2d 623 (Md. 1996); *People v. Granderson*, 538 N.W.2d 471, 473-74 (Mich. App. 1995) (defendant's response to being informed of right to state-paid counsel, "Yeah, I'm – I'm ah need that 'cause I can't afford none"), *appeal denied*, 554 N.W.2d 914 (Mich. 1996); *Parker*, 886 S.W.2d at 918 (Mo. 1994) (suspect said he "ought to talk to an attorney"); *State v. Jones*, 914 S.W.2d 852, 860 (Mo. App. 1996) ("Do I need an attorney?"); *LaFevers v. State*, 897 P.2d 292, 299 (Okl. Cr. 1995) ("Yeah, as soon as I talk to a lawyer"), *cert. denied, LaFevers v. Oklahoma*, 516 U.S. 1095 (1996); *Valdez v. State*, 900 P.2d 363, 373-74 (Okl. Cr.) ("Yes, I understand it a little bit and I sign it because I understand it something about a lawyer and he want to ask me questions and that's what I'm looking for a lawyer"), *cert. denied, Valdez v. Oklahoma*, 516 U.S. 967 (1995); *Parker v. State*, 917 P.2d 980, 983 (Okl. Cr. 1996) ("I would like to talk to an attorney"), *cert. denied, Parker v. Oklahoma*, ___ U.S. ___, 117 S.Ct. 777 (1997); *State v. Henness*, 679 N.E.2d 686, 695 (Ohio) ("I think I need a lawyer because if I tell you everything I know, how do I know I'm not going to wind up with a complicity charge?"), *cert. denied, Henness v. Ohio*, ___ U.S. ___, 118 S.Ct. 422 (1997); *State v. Charboneau*, 913 P.2d 308, 318, 320 (Ore. 1995) ("Will I have an opportunity to call an attorney tonight?"); *State v. Kennedy*, 479 S.E.2d 838, 844 (S.C. App. 1996) ("What if I ask for an attorney?"), *cert. granted*, ___ S.E.2d ___ (S.C. January 24, 1997); *Dinkins v. State*, 894 S.W.2d 330, 352 (Tex. Crim. App. 1995) ("Maybe I should talk to someone"); *State v. Panetti*, 891 S.W.2d 281, 282, 284 (Tex. Ct. App. 1994) ("Should I be answering these questions without my lawyer,

Similarly, lower courts have correctly followed *Davis* to find the *Edwards'* prophylactic ban on further questioning triggered

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or does it matter, or I mean I–I give up, anyway"), *review denied*, ___ S.W.2d ___ (Tex. Apr. 5, 1995); *Midkiff v. Commonwealth*, 462 S.E.2d 112, 115 (Va. 1995) ("I'll be honest with you, I'm scared to say anything without talking to a lawyer"); *State v. Jones*, 532 N.W.2d 79, 85 (Wis. 1995) (suspect's "I already got one", response after being informed of his right to counsel); *State v. Long*, 526 N.W.2d 826, 830 (Wis. App.) ("My attorney told me I shouldn't talk unless he is here"), *review dismissed*, 531 N.W.2d 330 (Wis. 1995). *See also Diaz v. Senkowski*, 76 F.3d 61, 63 n.1, 64 (2nd Cir. 1996) ("Do you think I need a lawyer?"); *Flamer v. Delaware*, 68 F.3d 710, 725 (3rd Cir.) (suspect's "request to call his mother 'to inquire about . . . possible representation'"), *cert. denied*, 516 U.S. 1088 (1996); *United States v. Scurlock*, 52 F.3d 531, 537 (5th Cir. 1995) (suspect's remark that she "needed" an attorney, made after she admitted involvement in the crime, after she had agreed to give a written statement, and in response to information that she would be indicted); *Ledbetter v. Edwards*, 35 F.3d 1062, 1067, 1069 (6th Cir. 1994) ("'It would be nice' to have an attorney"), *cert. denied*, 515 U.S. 1145 (1995); *United States v. Doherty*, 126 F.3d 769, 773 (6th Cir. 1997) (suspect's remark "that his mother was attempting to locate an attorney"); *Lord v. Duckworth*, 29 F.3d 1216, 1221 (7th Cir. 1994) ("I can't afford a lawyer but is there anyway I can get one?"); *United States v. Menzer*, 29 F.3d 1223, 1233 n.10 (7th Cir. 1994) ("maybe I should speak with a lawyer"), *cert. denied, Menzer v. United States*, 513 U.S. 1002 (1994).

in cases where the right to counsel is unequivocally invoked.[5]

Based on the above, *Davis*'s clear teaching requires no elucidation in order to be properly applied. Summary reversal will send a strong signal to lower courts misapplying and disregarding *Davis*, and to courts that have not yet addressed the issue, that *Davis* means what it says: suspects desiring counsel must say so unequivocally. *Davis*, 512 U.S. at 452, 459, 462.

## II. THE COURT SHOULD GRANT THE PETITION AND SUMMARILY REVERSE THE *ROMERO* MAJORITY

Summary reversal is a "rare disposition" reserved for situations in which "the law is settled and stable, the facts are not in dispute, and the decision below is clearly in error."

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[5] *E.g.*, *Spears*, 908 P.2d at 1071 ("And if you're going to pursue this and try to pin it on me, I want a lawyer because I'm not going to say nothing else until I can talk to a lawyer"); *Robinson v. State*, 698 So.2d 1160,1163 (Ala. Cr. App. 1996) (defendant "told" police "that he did not want to answer any more questions until he had an attorney present"), *cert. denied*, 698 So.2d 1165 (Ala. 1997); *Anderson v. State*, 492 S.E.2d 252 (Ga. App. 1997) (defendant "said that he wanted an attorney"), *cert. denied*, ___ S.E.2d ___ (Ga. Feb. 6, 1998); *State v. Harris*, 544 N.W.2d 545, 547, 552 (Wis. 1996) (defendant stated he did not desire to make any statements to police outside the presence of counsel); *Rule v. State*, 890 S.W.2d 158, 162 (Tex. App. 1994) ("I don't want to talk to anybody else without my lawyer"), *review denied*, ___ S.W.2d ___ (Tex. Mar. 8, 1995).

*Schweiker v. Hansen*, 450 U.S. 785, 790 (1981) (Marshall, J., dissenting). *Romero* fits these criteria. The applicable law is settled, the facts are undisputed, and, as demonstrated in Colorado's petition, the majority opinion is clearly erroneous.

The Court has summarily reversed other lower courts that have misapplied its *Miranda* jurisprudence.[6] It should do so here. Clear and workable guidelines like *Davis*'s bright line rule are essential both to implement *Miranda*'s prophylactic protections and to "fully protect" society's interests in effective law enforcement. *Moran v. Burbine*, 475 U.S. 412, 433 n.4 (1986). The Court has heretofore tried to make *Miranda*

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[6] *See, e.g., Stansbury v. California*, 511 U.S. 318, 319, 325-26 (1994) (per curiam) (summarily reversing state court's misapplication of *Beckwith v. United States*, 425 U.S. 341 (1976) and *Berkermer v. McCarty*, 468 U.S. 420 (1984)); *Pennsylvania v. Bruder*, 488 U.S. 9, 10 (1988) (per curiam) (summarily reversing state court decision misapplying *Berkermer*); *California v. Beheler*, 463 U.S. 1121, 1122 (1983) (per curiam) (summarily reversing state court decision misapplying *Miranda* and *Oregon v. Mathiason*, 429 U.S. 711 (1977), noting that "this question has already been settled by past decisions of this Court"); *Wyrick v. Fields*, 459 U.S. 42, 49-50 (1982) (per curiam) (summarily reversing Eighth Circuit opinion misapplying *Edwards*); *California v. Prysock*, 453 U.S. 355, 362 (1981) (per curiam) (summarily reversing state court decision misapplying *Miranda*); *Anderson v. Charles*, 447 U.S. 404, 407 (1980) (per curiam) (summarily reversing Sixth Circuit opinion misapplying *Doyle v. Ohio*, 425 U.S. 610 (1976)); *Oregon v. Mathiason*, 429 U.S. 711, 712 (1977) (per curiam) (summarily reversing state court decision misapplying *Miranda*).

workable without "unnecessarily frustrat[ing] the public's interest in the investigation of criminal activities," *Maine v. Moulton*, 474 U.S. 159, 179-80 (1985). Summary reversal here will remove the disavowed "third layer of prophylaxis," *Davis*, 512 U.S. at 462, erected by the *Romero* majority before *Davis*'s bright line rule is irreparably clouded.

## CONCLUSION

The petition for certiorari should be granted and the decision below summarily reversed.

Respectfully submitted,

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May 13, 1998

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No. 97-1688

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**IN THE SUPREME COURT OF THE UNITED STATES**
*October Term, 1997*

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**THE STATE OF COLORADO,**
*Petitioner,*

vs.

**MARIO ROMERO,**
*Respondent.*

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On Petition for Writ of Certiorari to
The Supreme Court of the State of Colorado

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# RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTION PRESENTED FOR REVIEW

Whether the respondent's statement, "I should talk to a lawyer," made near the beginning of the interrogation constituted an unambiguous request for counsel within the meaning of *Davis v. United States*, 512 U.S. 452 (1994).

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No. 97-1688

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**IN THE SUPREME COURT OF THE UNITED STATES**
*October Term, 1997*

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**THE STATE OF COLORADO,**
*Petitioner,*

vs.

**MARIO ROMERO,**
*Respondent.*

---

On Petition for Writ of Certiorari to
The Supreme Court of the State of Colorado

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## RESPONDENT'S BRIEF IN OPPOSITION

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The respondent, Mario Romero, respectfully requests this Court deny the petition for writ of certiorari, which seeks review of the Colorado Supreme Court's opinion in this case. That opinion is reported at ___ P.2d ____ (Colo. 1998) (Pet. app. A)

## SUMMARY OF THE ARGUMENT

The Colorado Supreme Court correctly stated the standard in *Davis* and faithfully implemented it. The Court properly invoked the totality of the circumstances test to determine that the respondent's request for counsel was unambiguous. Primarily the Court looked to the actual words spoken by the respondent, "I should wait and I should talk to a lawyer." Colorado's request to abandon the totality of the circumstances test in *Edwards/Davis* situations is made without citing any authority. Finally, Colorado's assertion that the decision in *Romero* is aligned with a minority of jurisdictions, which are bent upon undermining *Davis* is unsupported by the very cases cited by Colorado. In the final analysis,

no such majority/minority split exists, but rather, the lower courts have diligently applied the *Davis* standard to a variety of situations, each one determined upon its own specific facts and circumstances. Accordingly, Colorado's petition for writ of *certiorari* should be denied.

## REASONS WHY THE PETITION SHOULD BE DENIED

### I. THE COLORADO SUPREME COURT PROPERLY IMPLEMENTED THE *DAVIS* STANDARD WHEN IT FOUND THE RESPONDENT'S REQUEST FOR COUNSEL TO BE UNAMBIGUOUS.

Colorado claims that the Colorado Supreme Court merely gave lip service to the standard found in *Davis v. United States*, 512 U.S. 452 (1994), and failed to properly implement it. However, a careful review of the record reveals the opposite. The Court specifically relied upon the standard announced by this Court in *Davis*.

> If the desire for counsel is presented "**sufficiently clearly** that a reasonable police officer **in the circumstances** would understand the statement to be a request for an attorney," no ambiguity or equivocation exists, and all questioning must cease until the person can consult with counsel or the accused voluntarily reinitiates conversation.
>
> *Romero* pet. app. A-11 (emphasis added by the Colorado Supreme Court; quoting from *Davis*, 512 U.S. at 459).

Elsewhere in the opinion, the Court stated, "[w]hether an accused has invoked the right to counsel during questioning is an objective inquiry" (pet. app. A-10) and that the request for counsel must be made "sufficiently clearly" (pet. app. A-21) (quoting from *Davis*, 512 U.S. at 459). The Colorado Supreme Court further reasoned,

> When invoking the right to counsel during custodial interrogation a person may **demand** an attorney, a person may **ask for** an attorney or a person may make some statement which can "reasonable be construed to be an expression of a desire for the assistance of an attorney."
>
> Pet. app. A-24, 25 (emphasis added by the Colorado Supreme Court, and quoting from *Davis*, 512 U.S. at 459).

It is in the latter category (the reasonable expression of a desire for the assistance of an attorney) that the Court placed the respondent's request for counsel. Pet. app. A-25.

Both the majority and the lone dissenting justice agreed that the totality of the circumstances test applies in determining whether a request for counsel is unambiguous.[1] That is consistent with this Court's ruling in *Davis*, that a "reasonable police officer **in the circumstances** would understand the statement to be a request for an attorney." *Davis*, 512 U.S. at 459 (emphasis added).

However, the "circumstances" relied upon by the Colorado Supreme Court, were not that far reaching, notwithstanding the assertions to the contrary made by Colorado. A fair reading of the decision is that the actual words uttered by the respondent constituted the unambiguous request. Those words were "I should wait and I should talk to a lawyer . . . because I do want to go to trial on this."[2] Indeed, the Colorado Supreme Court distilled this statement down to the simple request "I should talk to a lawyer." Pet. app. A-7, 22, 23.

One of the "circumstances" applied by the Colorado Supreme Court was to strip from the statement the respondent's use of slang so that the essential message could be focused upon. Pet. app. A-21, 22. Throughout the interview the respondent spoke in slang. For

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[1] Petitioner not only advocates abandonment of totality of the circumstances test, but also criticizes the Colorado Supreme Court for citing with approval *Michigan v. Johnson*, 475 U.S. 625, 633 (1986) where this Court ruled that a "broad, rather than narrow interpretation to a defendant's request for counsel" applies in the Sixth Amendment context. Petitioner's concern is unwarranted since the Colorado Supreme Court did not implement a "broad" approach, but rather, correctly invoked the totality of the circumstances test.

[2] The actual statement was, "Yea. Cause I, ya know, I'm not gunna lie man, ya know, I mean I should wait, and I should talk to a lawyer and this and that and ya know because I do want to go to trial on this." Pet. App. C-4.

example he said "ya know" over 100 times. Pet. app. C. During his request for counsel, "ya know" was said three times. In addition, the respondent inserted "and this and that" which was another slang term used elsewhere in the interview. This process is no different than that employed by a reasonable police officer when interviewing a person like the respondent or a person who either speaks a foreign language or has poor command of English. It is important to note, however, that the core message, "I should talk to a lawyer," was relied upon by the Colorado Supreme Court in its unadulterated and original form. It was merely the surrounding verbiage and slang that was not considered.

Another of the "circumstances" relied upon by the Colorado Supreme Court was that the respondent made his request for counsel early in the interviewing process. Pet. app. A-18. The respondent was advised of his rights, signed a waiver[3] and began telling a narrative of how some people came over to his house and behaved in a threatening way. Pet. app. C-2, 3. The interviewing officer intervened and asked "so you thought you were defending yourself when you shot at the car?" Pet app. C-4. It was at this point that the respondent

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[3] While Colorado correctly states that both the Colorado Supreme Court and the trial court found that the respondent had validly waived his *Miranda* rights, it is noteworthy that, when it came to orally asking the respondent whether he wished to waive his rights, the transcript is suspiciously silent. *See* pet. app. C. Investigator Needham orally advised the respondent of his *Miranda* rights. Pet. app. C-1. He twice asked whether the respondent understood his rights, but never asked whether the respondent wished to waive those rights. Pet. app. C-1, 2. Investigator Needham represented that "the waiver card, is that I have read the above rights and understand each of those, is that true?" To which the respondent answered, "Yea." Pet. app. C-1. Investigator Needham continued, "Okay, having those rights in mind when answering these questions for us. Okay. Sign for me." Thereafter, Investigator Needham launched into questioning. Apparently the only indication that the respondent was willing to waive his *Miranda* rights was his signing of the "waiver card." Pet. app. A-3.

made his request for counsel, which was "within minutes" of his *Miranda* advisement. Pet. app. A-18. The Colorado Supreme Court felt this was significant and was in contrast to *Davis* where the request for counsel was not made until one and one-half hours into the interrogation. Pet. app. A-11, 18. The Colorado Supreme Court also observed that the respondent attempted to bring up the issue later in the interview, but was ignored by Investigator Needham. Pet. app. A-6.

While the Colorado Supreme Court noted that this Court "encouraged but did not require clarification of a suspect's ambiguous reference," (pet. app. A-15) it observed that Investigator Needham ignored both of the respondent's references to a lawyer. Pet. app. A-5, 6, 7, 22. After the respondent made the statement, "I should talk to a lawyer," Investigator Needham ignored the request and immediately went back to the discussion of self-defense. Pet. app. A-5. After the second reference to a lawyer, Needham enticed the respondent by saying that he originally was going to ask for first degree murder charges, but based upon the respondent's willingness to discuss the case, he was "thinking maybe second [degree murder] or something else."[4] Pet. app. A-6. This interviewing technique is to be contrasted with several of the cases relied upon by Colorado, where subsequent clarifying

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[4] Three days later, the respondent was charged with murder in the first degree and other offenses. Pet. app. A-7. Further, Investigator Needham admitted that he had read the *Davis* case and "purposefully" ignored the respondent's request. Pet. app. B-8. Apparently officer Needham was well schooled in the post-*Davis* style of interrogation, which encourages interrogating officers to ignore requests for counsel.

questions by interrogating officers helped the reviewing court decide whether an unambiguous request had been made.[5]

Primarily the Colorado Supreme Court relied upon the actual words spoken by the respondent. Scrutiny turned to the word "should" which the Court defined as "to express duty, obligation, necessity, propriety, or expediency," relying upon Webster's Third New International Dictionary, 2104 (1961). Pet. app. A-23. Accordingly, the respondent was conveying a "necessity" by saying he should talk to a lawyer. The respondent submits that the Colorado Supreme Court could not have been more faithful or diligent in its application of the *Davis* doctrine and that Colorado's assertion to the contrary is unsupported by the record.

## II. THIS COURT SHOULD NOT ABANDON THE TOTALITY OF THE CIRCUMSTANCES TEST WHEN DETERMINING WHETHER A REQUEST FOR COUNSEL IS UNAMBIGUOUS.

Colorado apparently argues that the totality of the circumstances test is inappropriate when determining whether a suspect has made an unambiguous request for counsel. Colorado makes this argument without citing any authority whatsoever. Apparently, Colorado is advocating a "words alone" analysis, again without citing authority. Such a claim is contrary to the dictates of *Davis*, itself, which required the determination to be made

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[5] *Medina v. Singletary*, 59 F.3d 1095 (11th Cir. 1995) (officers' follow-up questions aided the court in determining that the defendant had made an ambiguous request); *United States v. Scurlock*, (5th Cir. 1995)(interrogating agent's subsequent actions and questions, including asking the defendant again if she wished to talk to the agents, helped the reviewing court determine from "context" that defendant made an ambiguous request.); *Lord v. Duckworth*, 29 F.3d 1216 (7th Cir. 1994)(officer's "affirmative" response to the defendant's request for counsel important in determining that defendant did not desire to have an attorney present at that time).

under the "circumstances" facing the interrogating officer. *Davis*, 512 U.S. at 459. That language was no accident since *Edwards* itself delineated the standard for determining whether *Miranda* rights have been waived.

> It is reasonably clear under our cases that waivers of counsel must not only be voluntary, but must also constitute a knowing and intelligent relinquishment or abandonment of a known right or privilege, a matter which depends in each case "upon the particular facts and circumstances surrounding that case, including the background experience and conduct of the accused. *Edwards v. Arizona*, 451 U.S. 477, 482 (1981) [quoting from *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)].

The words alone approach is also inconsistent with other judicial determinations made in the interrogation context. *See Schneckloth v. Bustamante*, 412 U.S. 218 (1973) (voluntariness of confession to be determined by the totality of circumstances); *North Carolina v. Butler*, 441 U.S. 369, 374 (1979)(waiver of *Miranda* rights to be measured by the "particular facts and circumstances surrounding the case"); *Wyrick v. Fields*, 459 U.S.42, 47 (1982) *per curiam* (*Edwards* requires use of the totality of circumstances test when suspect attempts to re-initiate interview); *Fare v. Michael C.*, 442 U.S. 707, 725 (1979) (waiver of *Miranda* rights to be determined by totality of the circumstances). Moreover, several of the cases cited by Colorado rely upon context and circumstances in determining whether an unambiguous request has been made.[6]

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[6] *Medina v. Singletary*, 59 F.3d 1095 (11th Cir. 1995) (from context the defendant's answer of "no" to whether he wished to talk to officers actually meant "yes"); *Lord v. Duckworth*, 29 F.3d 1216 (7th Cir. 1994) (from the surrounding "circumstances" the defendant's request for counsel was merely a statement that he needed one in the future); *United States v. Scurlock*, 52 F.3d 531 (5th Cir. 1995)(from "context" defendant's statement was that she needed an attorney in the future, rather than an immediate request for counsel).

Finally, Colorado gives us little insight into which of the circumstances should be ignored in determining whether an unambiguous request has been made. Are the words in the transcript the sole source? Do we sanitize the respondent's spoken word of its inflection and intonation? Do we ignore whether the request was made at the beginning, in the middle or at the end of interrogation? The Colorado Supreme Court had available to it, not only the transcript, but also the audio tape of the respondent's interview, along with the transcript of the suppression hearing. Pet. app. A-3. Based upon the *entire* record, the Colorado Supreme Court found an unambiguous request for counsel.

Colorado's assertion that the totality of the circumstances test be abandoned, is supported by no authority, including the lone dissenter in *Romero*, Justice Mularkey, who wrote that the totality of the circumstances test was appropriate. Pet. app. A-32.

## III. THE COLORADO SUPREME COURT HAS NOT JOINED A "MINORITY OF JURISDICTIONS SEEKING TO UNDERMINE THE DICTATES OF *DAVIS*."

Several times in its petition, Colorado baldly claims that the Colorado Supreme Court has joined a minority of jurisdictions undercutting *Davis*, in contrast to a majority of other states and a majority of federal circuits. However, a faithful survey of the jurisdictions reveals not only that is there is no "minority" or "majority" split, but more importantly, that each case has been determined upon its own "facts and circumstances" as required by *Edwards* and *Davis*. Colorado's analysis is flawed because it fails to take into account the unique circumstances of each case and because it fails to focus upon the cases that were truly similar to the facts in *Romero*.

Statements similar to respondent's "I should talk to a lawyer," have almost uniformly been ruled to be unambiguous requests for counsel in other jurisdictions. In *Cannady v. Dugger*, 931 F.2d 752 (11th Cir. 1991), the court found the defendant's statement "I think I should call my lawyer," an unequivocal request for counsel.[7] See also, *Correll v. Thompson*, 63 F.3d 1279 (4th Cir. 1995)(defendant said he "thought he wanted an attorney" ruled to be unambiguous, relying upon *Cannady*). In *Smith v. Endell*, 860 F.2d 1528 (9th Cir. 1988), *cert. denied*, 498 U.S. 981 (1990), the court found identical words to those used in *Romero*, "I should talk to a lawyer," as an unequivocal request for counsel.

> The request was not ambiguous; Smith was uncertain whether the troopers considered him a suspect, but if they did, his intent was clear: "I should talk to a lawyer." In this respect his statement was not equivocal; there was no "might" or "maybe" or "perhaps."[8]
>
> *Smith*, 860 F.2d at 1531.

Colorado arbitrarily paints *Smith* and *Cannady* into a corner and labels them a "minority" viewpoint, yet Colorado offers no jurisdictions which have ruled, "I should talk to a lawyer" as ambiguous requests. Instead, Colorado compares these cases, which are on

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[7] Mr. Cannady's request is similar to the second request made in *Davis*. *Davis*, 512 U.S. at 455. Mr. Davis's first request for counsel, "Maybe I should talk to a lawyer," was ruled to be ambiguous. However, his second request made later in the interview, "I think I want a lawyer," precipitated a cessation of the interrogation.

[8] Colorado summarily dismisses *Smith* and *Cannady* because they were decided "pre-*Davis*." However, Colorado's reasoning is flawed. While *Davis* attached a different consequence to an ambiguous request for counsel, it did not disturb the calculus of *how* courts will determine whether ambiguity exists, nor the long line of cases making such determinations. The only difference in pre-*Davis* cases is that some jurisdictions were requiring interrogating officers to ask clarifying questions when an ambiguous request was made. The *Smith* case is extremely reliable as precedent and, in fact, prophetic, since the court found there were no words of equivocation like "maybe" preceding the statement, "I should talk to a lawyer." Of course, it was the "maybe I should talk to a lawyer" which constituted the ambiguous request in *Davis*.

point, with cases from other jurisdictions which are not. For example, Colorado primarily relies upon *State v. Parker*, 886 S.W.2d 908 (Mo. 1994), *cert. denied*, 514 U.S. 1098 (1995). However, a careful reading of *Parker* reveals it is of little precedental value. Mr. Parker was being interviewed by interrogating officers having been Mirandized. After making incriminating statements, Parker said he "ought to talk to an attorney" which prompted the officers to leave the room. Within five minutes, Parker opened the door and asked one of the officers, by name, to return to the room. He was given another *Miranda* advisement and made further statements. This prompted the court to observe,

> Even if Parker did invoke the right [to counsel], he promptly initiated further communication by voluntarily calling an officer back into the room. Thus, there was no Fifth Amendment violation.
> *Parker*, 336 S.W.2d at 918.

Obviously the court was relying upon the language in *Edwards* which permits further interrogation, even after a request for counsel is made, when the accused "initiates further communication, exchanges, or conversations with the police." *Edwards*, 451 U.S. at 484-485. The court in *Parker* gratuitously added that the word "ought" did not constitute an unambiguous request for counsel. However, given the totality of the circumstances, the underlying factual predicate of *Parker* is extremely dissimilar to that found in *Romero*. Investigator Needham did not leave the room when the respondent said that he should talk to an attorney. Neither did the respondent unilaterally re-initiate conversations with the police.

Colorado's reliance on *Lord v. Duckworth*, 29 F.2d 1216 (7th Cir. 1994) is faulty for the same reasons. Initially it is important to note that the court in *Lord* cited with approval *Cannady* and *Smith*. However, the court went on to distinguish those cases based upon the

context in which Mr. Lord stated, "I can't afford a lawyer, but is there any way I can get one?" The court emphasized that Mr. Lord had already confessed in a lengthy tape recorded statement and had agreed to assist the police in searching for the murder weapon.[9] Furthermore, the court found it important that after Mr. Lord asked if he could get a lawyer, the interrogating officer answered in the affirmative. Instead of pursuing the matter, the defendant added, he would also like to see a doctor. Under these "circumstances" the court correctly found that Mr. Lord was merely referring to his need to consult with an attorney at a future time.[10]

The few remaining cases, dubbed by Colorado as the "majority" position, simply are not helpful in supporting that conclusion. For example, in *Diaz v. Senkowski*, 76 F.3d 61 (2nd Cir. 1996), the court found the defendant's statement, "Do you think I need a lawyer?" an ambiguous request. That request was so different from respondent's and so facially ambiguous that it is unclear why Colorado relies upon it. It certainly does not support a

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[9] Colorado relies on several cases where the request for counsel came at the end of the interrogation rather than, as in this case, in the beginning. *See Lord*; *Diaz v. Senkowski*, 71 F.3d 61 (2nd Cir. 1996)(defendant asked interrogating officers, after four hours of questioning, "Do you think I need a lawyer"); *United States v. Scurlock*, 52 F.3d 531 (5th Cir. 1995)(the defendant gave a lengthy confession, was then told by the agent she would probably be indicted, which prompted her to say she needed an attorney).

[10] Colorado also contends that *Lord* and *Scurlock* support its position that respondent was merely stating that he would need an attorney in the future. However, *Lord* and *Scurlock* are easily distinguishable on their facts. In both cases the alleged request for counsel came at the end of the interrogation, rather than at the beginning. Moreover, the respondent's own words dispel any inference that he was alluding to the future. He said, "**I should wait** and I should talk to an attorney." Obviously the respondent was stating that he should wait to talk to investigator Needham until he had a lawyer, thus expressing the immediacy of the situation, rather than the need for an attorney in the future.

finding that a majority/minority split has developed, after *Davis*. In summary, Colorado alleges but fails to demonstrate that there is any kind of a split among the jurisdictions or that the Colorado Supreme Court has joined a "minority" of jurisdictions seeking to "undermine" *Davis*.

The brief filed by *amici* suffers from the same maladies. Supporting what it calls the "majority" position, it relies upon the following ambiguous requests: "Is it going to piss y'all off if I ask for my -- to talk to a friend that is an attorney?[11]"; "Do you think I need an attorney?[12]"; "I might need one. If I need one[13]"; The defendant "would talk to [her] lawyer tomorrow[14]"; "I'll be honest with you, I am scared to say anything without talking to my lawyer[15]"; "maybe I should speak with a lawyer[16]"; defendant "might need a lawyer[17]"; "Do I need an attorney?[18]"; "What if I ask for an attorney?"[19] These cases involving obviously ambiguous requests shed little light on the case at bar and do little to demonstrate the majority/minority split alleged. Other cases cited by *amici* with seemingly

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[11] *Brown v. State*, 668 So.2d 102 (Ala. Cr. App. 1995).

[12] *Higgins v. State*, 879 S.W.2d 424 (Ark. 1994).

[13] *Henry v. State*, 462 S.E.2d 737 (Ga. 1995).

[14] *Luallen v. State*, 465 S.E.2d 672 (Ga. 1996).

[15] *Midkiff v. Commonwealth*, 462 S.E.2d 112 (Va. 1995).

[16] *United States v. Menzer*, 29 F.3d 1223 (7th Cir. 1994) *cert. denied* 513 U.S. 1002 (1994).

[17] *State v. Morgan*, 559 N.W.2d 603 (Iowa 1997).

[18] *State v. Jones*, 914 S.W.2d 852 (Mo. App. 1996).

[19] *State v. Kennedy*, 479 S.E.2d 838 (S.C. App. 1996).

less ambiguous requests for counsel, are easily distinguished on their case specific facts and circumstances. For example, *amici* rely upon *Tucker v. State*, 491 S.E.2d 420, 421 (Ga. App. 1997)("I guess I need a lawyer, because I wasn't even there when that happened"). However, *amici* fail to disclose a very important portion of the context of the statement. Mr. Tucker was asked if he wanted to talk to officers about the charges. Mr. Tucker responded, "I don't know what to do. I guess I need a lawyer because I wasn't even there when that happened. I was tied up in the attic with ropes." Under these circumstances, it was an easy matter for the Georgia court to rule that Mr. Tucker was equivocal and that guessing he needed a lawyer did not equate to a request for counsel. *Amici* fail to disclose equally important information in *Parker v. State*, 917 P.2d 980, 983 (Okl. Cr. 1996) ("I would like to talk to an attorney"). The full context of Mr. Parker's statement reveals his equivocation. When asked if he would give a statement, he said, "I'll give you some statements, I would like to talk to an attorney." This equivocation prompted interrogating officers to ask follow-up questions which revealed to the Oklahoma court that Mr. Parker was equivocating and that he did want to give "some statements." *Amici* also rely upon *State v. Wesley*, 691 So.2d 772, 774 (La. App. 1997)("Can I get me a lawyer before I talk? Like the man said on that thing right there?"). The Louisiana court found the statement to be equivocal because it was a question, rather than an assertion of his rights. In addition, interrogating officers asked several times whether the defendant wished to have the questioning cease. Notwithstanding, the defendant insisted on telling his side of the story. From these cases, it is easy to determine that *amici* have not revealed all of the pertinent facts in the cases they cite. A fair review of those cases indicates that in each instance, the

court made a fact-specific determination, based upon all of the circumstances in the case, in deciding whether a particular request was "ambiguous" or not. That is the same process that was used by the Colorado Supreme Court in *Romero*. To the extent *amici* have placed partial information before the Court to support their conclusion that a minority of jurisdictions are eroding *Davis*, their conclusion is unfounded.

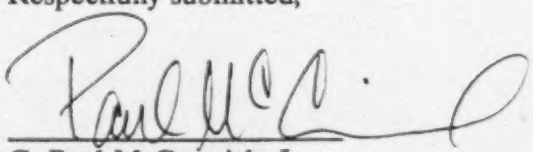
*Amici* employ the same tactic as Colorado by taking the few cases which have ruled "I should talk to a lawyer" to be unambiguous, and arbitrarily calling them the "small but troubling minority of courts unwilling to apply *Davis'* bright line rule." The real failure of the *amici*, and for that matter Colorado, is the inability to point to any case that has language substantially similar to "I should talk to a lawyer," and which is contextually similar to respondent's case, where the court found the request to be ambiguous or equivocal. The respondent's search of the various jurisdictions reveals no such case. This totally undermines the allegation that there is a majority/minority application of the *Davis* doctrine. Instead, the careful reading of all the cases cited by Colorado and *amici* results in the inescapable conclusion that each lower court has conscientiously applied the *Davis* rule to the "facts and circumstances" of each case.

## CONCLUSION

The Colorado Supreme Court properly articulated the standard in *Davis*, diligently applied the totality of the circumstances test to the facts of this case and correctly ruled that the respondent's statement "I should wait and I should talk to a lawyer" was an unambiguous request for counsel. The totality of the circumstances test is the correct measure for determining whether a person being interrogated has asserted his or her *Miranda/Edwards*

rights. Colorado has failed to demonstrate that the decision in *Romero* was contrary to *Davis* or that *Romero* is consistent with the "minority" of other jurisdictions which are seeking to "undermine" the dictates of *Davis*. Colorado's petition for a writ of *certiorari* should, therefore, be denied.

Respectfully submitted,



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No. 97-1688

**IN THE SUPREME COURT OF THE UNITED STATES**
*October Term, 1997*

**THE STATE OF COLORADO,**
*Petitioner,*

vs.

**MARIO ROMERO,**
*Respondent.*

On Petition for Writ of Certiorari to
The Supreme Court of the State of Colorado

**CERTIFICATE OF SERVICE**

I, G. Paul McCormick, Jr., a member of the Bar of this Court, hereby certify that on this 30th day of July, 1998, one copy of Respondent's Brief in Opposition in the above-entitled case, was mailed First Class Postage prepaid to the following:

John Daniel Daily
*Counsel of Record*
Colorado Attorney General's Office
1525 Sherman Street, 5th Floor
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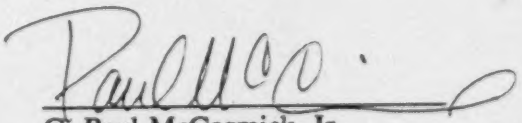
I further certify that all parties required to be served have been served.



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